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Corporations--A Survey of the Pending West Virginia Corporation Act

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CORPORATIONS—A SURVEY OF THE PENDING WEST VIRGINIA CORPORATION ACT*

On March 9, 1974, the West Virginia Legislature passed Senate Bill 107 containing the first comprehensive corporation act to be adopted in West Virginia since 1931. The Bill was drafted by a "Corporation Law Study Committee" that was created by the Legislature in April, 1972. After studying the present West Virginia law, the Delaware corporation law, and the American Bar Association Model Business Corporation Act and Model Non-Profit Corporation Act, the Committee chose the A.B.A. Model Acts as the basis for the new West Virginia Corporation Act.¹

The pending Act as adopted was found to contain flaws, mistakes, and other problems that required routine corrections. Additionally, some members of the Legislature desired the new Act to be reviewed by a committee of the West Virginia State Bar so that it could be amended in 1975 to correct all clear errors and reflect any suggested changes needed in the Act itself. Thus the effective date of the Act was purposely delayed until July 1, 1975, in order to allow this work to be done.²

The Act is divided into three primary parts: the first dealing with corporations generally (Part II);³ the second with business

* This article is the culmination of more than six months work on the part of nine senior members of the West Virginia Law Review. Each student worked independently on a separate area of the pending Act, and although continuity between the topic areas of the Act was stressed, the subject matter often deserved, and sometimes necessitated, unequal treatment.

The pending Act is discussed by subject matter rather than section by section. In this manner we were able to cross reference to related sections of the pending Act and discuss them as they interacted. Discussion of nonprofit corporation provisions can be found with their business corporation counterparts.

¹ Acts of the 61st W. Va. Leg. ch. 13, § 31-1-1, Reg. Sess. (1974) [hereinafter cited as Acts]. It should be noted that the section numbers in the Acts are identical to those that can be found for the pending Act in West Virginia Code Annotated. The present West Virginia corporation statute is cited to West Virginia Code Annotated.

² This information was provided by William M. Woodroe, Chairman of the "Special Committee to Study the Recodification of the Corporation Laws of West Virginia" established by the West Virginia State Bar. Mr. Woodroe has been most cooperative to the Law Review, and his efforts on our behalf are greatly appreciated.

³ Acts §§ 31-1-6 to -76.

corporations only (Part III);⁴ and the final part with nonprofit corporations only (Part IV).⁵ On the effective date, the pending West Virginia Corporation Act shall apply to and govern all corporations then existing or thereafter formed. Nothing in the pending Act is to affect the existence of any corporation or impair the validity of any act done in reliance on preexisting law.⁶

I. PURPOSES AND POWERS OF CORPORATIONS

The pending West Virginia Corporation Act allows a business corporation to be organized for any lawful purpose or purposes.⁷ Thus, the general purpose clause in the pending Act is substantially similar to the present provision.⁸

According to the pending Act, nonprofit corporations may be organized for a variety of lawful purposes.⁹ The current Act has no similar provision because *nonprofit* corporations receive no separate consideration; however the purposes for forming *nonstock* corporations are listed.¹⁰ The inclusion in the pending Act of provisions concerning nonprofit corporations and the exclusion of those provisions concerning nonstock corporations was wise. Nonprofit corporations are more prevalent than nonstock corporations, and nonprofit corporations can either be stock or nonstock. Consistent with the present statutory provision, the pending Act provides that a church or religious denomination cannot incorporate.¹¹ Any attempt to create a religious corporation is void and will confer no corporate powers.¹²

Corporations have long been held to have only those powers expressly granted by their charters and implied therefrom.¹³ How-

⁴ Acts §§ 31-1-77 to -135.

⁵ Acts §§ 31-1-135 to -160.

⁶ Acts § 31-1-3.

⁷ Acts § 31-1-7(a). This provision differs from section 3(a) of the Model Business Corporation Act only in that it deletes the phrase "except for the purpose of banking or insurance." 1 MODEL BUS. CORP. ACT ANN. § 3(a) (2d ed. 1971).

⁸ W. VA. CODE ANN. § 31-1-4 (1972 Replacement Volume).

⁹ Acts § 31-1-7(b).

¹⁰ W. VA. CODE ANN. § 31-1-4a (1972 Replacement Volume). Nonstock corporations are those that have no capital stock, no shares of stock, and no stockholders. Nonprofit corporations are corporations that distribute no part of their income or profit to shareholders, members, directors, or officers. Acts § 31-1-6(n).

¹¹ Acts § 31-1-7(c).

¹² In *Lunsford & Withrow & Co. v. Wren*, 64 W. Va. 458, 63 S.E. 308 (1908), the court took judicial notice of this provision.

¹³ *E.g.*, *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127 (1804);

ever, case law and statutes have recognized many corporate powers as inherent, making it unnecessary to enumerate them in the articles of incorporation. The pending Act, like the present one, grants broad powers to all corporations without having to list them in the charter.¹⁴ A number of these powers are incorporated into the present West Virginia statutory law.¹⁵ Some of the powers in the pending Act have been discussed in prior case law but have not heretofore been codified,¹⁶ and two of the powers have received no previous recognition in West Virginia at all.¹⁷ Several powers listed in the new statute mark a significant change or departure from West Virginia case law and present statutory law.

Laurel Fork & Sand Hill R.R. v. West Virginia Transp. Co., 25 W. Va. 324 (1884); Baltimore & O.R.R. v. Supervisors, 3 W. Va. 319 (1869).

¹⁴ Acts § 31-1-8. See Gibson, *The Virginia Corporation Law of 1956*, 42 VA. L. REV. 445 (1956).

¹⁵ Acts § 31-1-8(a), (b), (c), (d), (e), (g), (k), (l), and (r). Paragraph (a) of section eight of the pending Act corresponds with W. VA. CODE ANN. §§ 31-1-3, -5 (1972 Replacement Volume). Paragraphs (b), (c), (d), (l), and (r) reiterate corresponding powers contained in W. VA. CODE ANN. § 31-1-3 (1972 Replacement Volume). Paragraph (e) reaffirms W. VA. CODE ANN. §§ 31-1-3, -64 (1972 Replacement Volume). The right is more specifically dealt with in Acts §§ 31-1-120, -121.

W. VA. CODE ANN. § 31-1-65 (1972 Replacement Volume) is the predecessor to paragraph (g). See *Felsenheld v. Bloch Bros. Tobacco Co.*, 119 W. Va. 167, 192 S.E. 545 (1937), where speculation in stocks by officers and directors with corporate funds through the instrumentality of a corporate subsidiary, was allowed because the speculation was not extensive.

As stated in paragraph (l), the power to make reasonable bylaws inheres in every corporation. However, in Acts § 31-1-17, which is to replace W. VA. CODE ANN. § 31-1-19 (1972 Replacement Volume), the power to make and alter bylaws is shifted from the shareholders to the board of directors.

¹⁶ Acts § 31-1-8(i), (j). The powers codified in paragraph (i) of section eight have been judicially noted in the following cases: *Felsenheld v. Bloch Bros. Tobacco Co.*, 119 W. Va. 167, 192 S.E. 545 (1937) (right to invest, extensive speculation prohibited); *Howard v. Tatum*, 81 W. Va. 561, 94 S.E. 965 (1918) (right to lend money); *Wroten's Assignee v. Armat*, 72 Va. (31 Gratt.) 228 (1879) (right to take and hold property as security recognized).

The right contained in paragraph (j) has not been mentioned in West Virginia case law. However, an early United States Supreme Court decision strongly endorsed this power. In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1889), the Court declared that a state may allow the creation of a corporation to do anywhere anything of which it approves.

¹⁷ Acts § 31-1-8(n), (q). For a discussion of paragraph (n), see 1 MODEL BUS. CORP. ACT ANN. § 4(n), ¶ 2 (2d ed. 1971). The right codified in paragraph (q) was recognized in the Model Business Corporation Act but was eliminated in 1969 because of the all-inclusive nature of the provisions on voluntary dissolution. See Acts §§ 31-1-124 to -129 (voluntary dissolution) and § 31-1-64 (conditions of expiration of corporate existence).

The pending Act provides that a corporation has the power to lend money and use its credit to assist its employees.¹⁸ This authority was not heretofore codified in West Virginia. In *Felsenheld v. Bloch Brothers Tobacco Co.*¹⁹ corporate officials had received loans at less than the legal rate of interest with the consent and approval of the other directors. The court stated that it was not inherently wrong for surplus funds of a corporation to be loaned to its directors or officers, provided the transaction was free of fraud.²⁰ While that case applied to a specific fact situation, this new all-embracing power may have serious ramifications on corporate practice, due to possible abuses. This paragraph may permit a corporation to guarantee to pay its officers' or employees' debts.²¹ Furthermore, by such power, officers and employees may fail to distinguish between personal and corporate funds, which is essential in maintaining the separate entity of the corporation. Such action may jeopardize the rights of creditors and of other shareholders, and in the case of small corporations, where one officer could dominate, serious questions might arise as to the interest rate, duration, and other conditions of the corporate loan.²²

Thus, this statutory provision may stimulate grave abuses, as a corporation may use this new-found power to eliminate its employees' debts or to grant loans with such favorable conditions as to be prejudicial to the interests of the shareholders. As a remedy, corporate loans to employees should be approved by at least a two-

¹⁸ Acts § 31-1-8(f).

¹⁹ 119 W. Va. 167, 192 S.E. 545 (1937).

²⁰ *Id.* at 175, 192 S.E. at 549. Despite the *Felsenheld* decision, the general authority in West Virginia holds that a corporation, unless authorized by its charter, cannot extend its credit. See *First Nat'l Bank v. Tri-State Equip. & Repair Co.*, 108 W. Va. 686, 152 S.E. 635 (1930) (loans to shareholders), *Brown v. American Gas Coal Co.*, 95 W. Va. 658, 123 S.E. 412 (1924) (loans to shareholders), *Haupt v. Vint*, 68 W. Va. 657, 70 S.E. 702 (1911) (forbidding extensions of credit by accommodation indorsement or by contract of suretyship or guaranty). See also 4 M.J. Corporations § 214 (1949).

²¹ Emerson, *Vital Weaknesses in the New Virginia Stock Corporation Law and the Model Act*, 42 VA. L. REV. 489 (1956). Paragraph (f) refers to loans or credit given to employees. Employees are defined as including officers but not directors, unless a director is also an officer. Acts § 31-1-6(i). Acts § 31-1-101 provides that a corporation shall not lend money or extend credit to its directors without authorization by its shareholders but may lend money or extend credit to any employee or employees (predominantly officers) who are also directors if the board of directors decides that such assistance may benefit the corporation.

²² Priest, *Pros and Cons of the New Virginia Corporation Law*, 42 VA. L. REV. 989, 994 (1956).

thirds vote of the shareholders or banned entirely.²³

The pending Act grants the power to make donations for the public welfare or for charitable, scientific, or educational purposes.²⁴ At common law, corporate gifts for the public welfare or for charitable, scientific, or educational purposes were ultra vires unless they could be brought within the express or implied powers of the corporation. Statutory provisions in the majority of jurisdictions have since superseded the common law rule,²⁵ and corporate philanthropy has increased as a result.²⁶ Under the present West Virginia corporation statute, which substantially follows section 170(c) of the Internal Revenue Code of 1954, contributions are permitted to the United States, any of its possessions, any state, territory, or political subdivision, or the District of Columbia for exclusively public purposes and to any corporation, trust, or community chest, fund, or foundation for religious, charitable, scientific, educational, or other similar purposes. No part of the net earnings of the donee can inure to the benefit of any private shareholder or individual in the donee organization. West Virginia also excludes from permissible donees those organizations any substantial part of whose activities involve the carrying on of propaganda or the influencing of legislation.²⁷

Virginia's statute on donations uses more specific language than West Virginia's present statute, including a provision limiting the power to make such contributions in excess of five percent of net income computed before federal and state taxes on income and without taking into account any deduction for gifts. Furthermore, the general corporate power to make donations may be limited either by the charter or by shareholder resolution.²⁸

The wording of this paragraph in the pending Act makes it subject to attack, as it is sufficiently lax to create a potential for

²³ *Id.* at 995. VA. CODE ANN. § 13.1-3(f) (1973 Replacement Volume) is identical to paragraph (f).

²⁴ Acts § 31-1-8(m).

²⁵ 1 MODEL BUS. CORP. ACT ANN. § 4(m) (2d ed. 1971).

²⁶ See Prunty, *Love and the Business Corporation*, 46 VA. L. REV. 467 (1960). But see W. VA. CODE ANN. § 3-8-8 (1971 Replacement Volume), where corporate contributions to candidates or political committees are prohibited.

²⁷ W. VA. CODE ANN. § 31-1-3 (1972 Replacement Volume); 1 MODEL BUS. CORP. ACT ANN. § 4(m), ¶ 3.03 (2d ed. 1971).

²⁸ VA. CODE ANN. § 13.1-3(m) (1973 Replacement Volume). This provision mirrors INT. REV. CODE OF 1954, § 170(b)(2), which allows as a deduction an amount not to exceed five percent of a corporation's taxable income.

abuse. There is no reasonable quantitative limitation as to the amount of the total gift, nor is any reference made to such a restriction by charter or resolution of the shareholders, even though such action is not precluded. In essence, the provision offers little protection for the shareholders or the public, as the board of directors has almost the sole power to determine the recipient and size of a corporate donation. Moreover, without statutory limitations, the shareholders are likely to offer little resistance, as typically the charter is drawn by management without shareholder participation, and the absence of any requirement that the management disseminate to the shareholders its intent to donate or a report regarding such a corporate gift makes it highly unlikely that the disorganized shareholders would adopt a resolution limiting corporate donations.²⁹

For the first time in West Virginia, express authority is given a corporation to establish pension plans, stock option plans, and other incentive plans for any or all of its directors, officers, and employees.³⁰ Such authority, under the present Act, however, was implied from a corporation's power to fix the compensation of its officers or agents.³¹

A corporation, under the pending Act, also has the power to participate in any joint partnership, joint venture, trust, or other enterprise.³² West Virginia presently has no such statutory provision. In fact, common law courts have held that there was no implied corporate power to become a partner, and such partnerships were only sustained where authorized by the corporation's charter.³³ This new provision eliminates the requirement of an ex-

²⁹ Emerson, *Vital Weaknesses in the New Virginia Stock Corporation Law and the Model Act*, 42 VA. L. REV. 489, 498 (1956). See also Priest, *Pros and Cons of the New Virginia Corporation Law*, 42 VA. L. REV. 989, 995 (1956).

³⁰ Acts § 31-1-8(o). See Gibson, *The Virginia Corporation Law of 1956*, 42 VA. L. REV. 445, 453 (1956). In *Felsenheld v. Bloch Brothers Tobacco Co.*, 119 W. Va. 167, 178, 192 S.E. 545, 550, (1937), a corporation offered a stock subscription plan to the employees to induce them to become financially interested in the company through the ownership of stock. Such a plan has a laudable purpose, said the court, but the acquisition of additional stock by dominating shareholders and officials of the company through the plan was entirely beyond the scope and purpose of the plan.

³¹ See W. VA. CODE ANN. § 31-1-3 (1972 Replacement Volume) and Acts § 31-1-8(k).

³² Acts § 31-1-8(p).

³³ See *Wiley N. Jackson Co. v. Norfolk*, 197 Va. 62, 87 S.E.2d 781 (1955); *Perkins v. Friedberg*, 90 W. Va. 185, 110 S.E. 618 (1922), *News Register Co. v.*

press grant of such power to form a partnership in the charter, but because of its broad language, misuses of corporate power may result. For one, the power applies to all corporations; no limitations are included as in the Virginia statute.³⁴ In Virginia, public service companies, banking corporations, insurance companies, building and loan associations, credit unions, and industrial loan associations are precluded from exercising the right to form partnerships. Such restrictions in the West Virginia provision would do much to lessen the potential for abuse to those corporations where the potential is not as high. Second, the requirement of a majority or two-thirds assent of the shareholders, either by statute or charter, as a prerequisite to the exercise of such authority would serve as a further restraint on the corporation.

II. THE PROCESS OF INCORPORATION

The first step after reaching a decision to incorporate is to choose a corporate name. The pending Act provides that the corporate name must contain one of the following words: corporation, company, incorporated, limited, or an abbreviation thereof.³⁵ This provision will eliminate many names that a corporation may currently choose.³⁶

The name selected by the corporation cannot be the same as, or deceptively similar to, any domestic corporation or any foreign corporation registered in this state. If a corporation desires to use

Rockingham Publishing Co., 118 Va. 140, 86 S.E. 874 (1915). See also 4 M.J. Corporations § 215 (1949) and 1 MODEL BUS. CORP. ACT ANN. § 4(p) (2d ed. 1971).

This common law prohibition is based on the theory that a corporation is to manage its affairs separately and exclusively. The participation of a corporation in a joint venture would allow a partner to engage in corporate activities, thereby impinging on the management powers delegated to the officers and directors. In addition, partnership activities could expose the corporation's assets to possible liabilities and could present an ultra vires question where the partnership's activities are beyond the scope of the corporation's charter. W. CARY, CORPORATIONS 58-59 (4th ed. 1970). However, by grants in statutes and charter provisions, corporate participation in partnerships has become increasingly common. The practitioner should note W. VA. CODE ANN. §§ 47-8A-1 to -45 (1966) (Uniform Partnership Act); W. VA. CODE ANN. §§ 47-9-1 to -30 (1966) (Uniform Limited Partnership Act).

³⁴ VA. CODE ANN. § 13.1-3(p) (1973 Replacement Volume).

³⁵ Acts § 31-1-11(a)(1).

³⁶ Under current West Virginia law, a corporation must adopt either "association," "company," "corporation," "club," "incorporated," "society," "union," or "syndicate," or an abbreviation of "co." or "inc." W. VA. CODE ANN. § 31-1-6 (1972 Replacement Volume). Although some of the above names are eliminated, corporations currently using such names will not have to change.

a name previously taken, it must file with the Secretary of State either the written consent of the other corporation, adding one or more words to the similar name to make it distinguishable, or a certified order from a court of competent jurisdiction showing a prior right of the applicant to use such name in this State.³⁷ No corporation may choose a name which implies a purpose other than those contained in its articles of incorporation.³⁸ The pending Act allows a successor corporation in a merger, reorganization, or consolidation to continue to use the same name as its predecessor corporation if it was licensed to do business in the State.³⁹ It also provides that a corporation may not include the word "engineer," "engineers," "engineering," or any combination of these words unless the purpose of the corporation is to practice professional engineering.⁴⁰ This does not change the current West Virginia practice.⁴¹

Under both the current and pending Acts, a corporation may reserve a name for a period of time prior to incorporation. The pending Act grants five separate entities the right to reserve a name for a period of 120 days prior to the filing of an application for incorporation.⁴² This offers an improvement in the present law

³⁷ Acts § 31-1-11(a)(3). Although the pending Act allows an entity to establish a prior claim to a name, it makes no provision as to whether both corporations may use the name or whether the corporation not prevailing must change its name. The intent would appear to be that the corporation losing should modify its name; however, this intent should be specifically codified.

³⁸ Acts § 31-1-11(a)(2). The present provision, W. VA. CODE ANN. § 31-1-6(a) (1972 Replacement Volume), prevents the use of similar names which would, in the opinion of the Secretary of State, lead to confusion. Such a determination may be considered as a matter for the courts, not the Secretary of State. *Op. Att'y Gen.*, August 4, 1971 (not yet in bound volume). There is substantial Virginia case law on the subject. *E.g.*, *Cavalier Poodle Club v. Cavalier Poodle Club*, 206 Va. 945, 147 S.E.2d 68 (1966); *Rosso and Mastracco v. Giant Food Shopping Center*, 200 Va. 159, 104 S.E.2d 776 (1958). *Most Worshipful Grand Lodge v. Most Worshipful Prince Hall Grand Lodge*, 90 W. Va. 424, 111 S.E. 309 (1922), held that use of a corporate name would be enjoined where the false representations and deceptive practices of the corporation's officers and agents leads people to believe they are dealing with another concern.

³⁹ Acts § 31-1-11(b).

⁴⁰ Acts § 31-1-11(c).

⁴¹ W. VA. CODE ANN. § 31-1-6a (1972 Replacement Volume).

⁴² Acts § 31-1-12. The entities which may reserve a name are: (a) any person intending to organize a corporation under the Act; (b) any domestic corporation intending to change its name; (c) any foreign corporation intending to apply for a certificate to do business in this State; (d) any foreign corporation authorized to do business in this State and intending to change its name; and (e) any person

since, currently, only a natural person wishing to incorporate may reserve a name. The pending Act will not only allow this, but will also allow both domestic and foreign corporations desiring to change their names, to reserve a name.⁴³ This reservation is accomplished by filing the selected name with the Secretary of State,⁴⁴ and a properly reserved name may be transferred by filing notice of the transfer with the Secretary of State.⁴⁵

The current West Virginia corporation act requires that at least three people join to form a stock corporation and that no fewer than five associate to form a nonstock corporation.⁴⁶ The pending Act significantly changes this by allowing either one or more persons, or a domestic or foreign corporation, to act as incorporators for either a business or nonprofit corporation.⁴⁷ Although at least three natural people are required under the current Act, this restriction has little practical effect due to the use of "dummy incorporators."⁴⁸ Also under the current Act a corporation may not be an incorporator.⁴⁹ The restriction upon only natural persons being incorporators was dropped from the Model Business Corporation Act, on which the pending Act is patterned, in 1962. The drafters of the Model Act felt that "the role of incorporator is neither significant nor lasting in effect; it is now little more than ritualistic, and the specification of three natural persons as incorporators has become unnecessary."⁵⁰

intending to organize a foreign corporation and intending to have such corporation make application for a certificate to do business. Under the current Act, persons desiring to form a corporation may reserve a name for sixty days. W. VA. CODE ANN. § 31-1-6(a) (1972 Replacement Volume).

⁴³ Acts § 31-1-12.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ W. VA. CODE ANN. § 31-1-4 (1972 Replacement Volume).

⁴⁷ Acts § 31-1-26.

⁴⁸ See H. HENN, LAW OF CORPORATIONS § 185 (2d ed. 1970). The Model Business Corporation Act defines "dummy" incorporators as "persons having no real interest in the corporation who acted as incorporators at the request of the real party or parties in interest in order to comply with the statutory provisions." 2 MODEL BUS. CORP. ACT ANN. § 53, ¶ 2 (2d ed. 1971).

⁴⁹ In 45 OP. ATT'Y GEN. 560 (1954), it was stated that a corporation could not be an incorporator even though the word "person" as defined by the West Virginia Code included corporations. The opinion was not based on any previous West Virginia law, but rather upon similar holdings in other jurisdictions. The authorities cited base their opinions upon the principle that a corporation has only those powers conferred upon it by statute.

⁵⁰ 2 MODEL BUS. CORP. ACT ANN. § 53, ¶ 2 (2d ed. 1971).

The pending Act sets forth what the articles of incorporation may contain, dividing the discussion into three parts: (1) matters which shall be included in the articles of incorporation of both business and nonprofit corporations; (2) matters which shall be included only in the articles of incorporation of business corporations; and (3) matters which shall be included only in the articles of incorporation of nonprofit corporations.⁵¹ The pending Act parallels the current law in that it requires the articles of incorporation for both a business and a nonprofit corporation to set forth the name of the corporation, the name and address of each incorporator, and the duration of the corporation. The pending Act requires only the address of the corporation's initial principal office, while the current Act requires that the address of both the principal office and the corporation's chief works be included in the articles of incorporation.⁵²

A business corporation must, in addition, include in its articles of incorporation statements concerning the number of shares of stock to be issued, the different classes into which the shares will be divided, and the preferences, limitations, and relative rights of each share in every class.⁵³ A business corporation may also include in the articles of incorporation any provision for the regulation of its internal affairs which is not inconsistent with the law. These can include any provision that would restrict the transfer of shares or that could be included in the bylaws under any other provision of the pending Act.⁵⁴ The pending Act omits the current requirement that the amount of capital with which the corporation will commence business must be included in the articles of incorporation.⁵⁵ The Model Business Corporation Act before its revision required a clause similar to that in the current Act. The inclusion of this in the original Model Act was based more on tradition than protection. This clause was dropped from the Model Act in 1962 since the original reason for it had disappeared. It cannot be said that the requirement of one thousand dollars in paid-in capital

⁵¹ Acts § 31-1-27.

⁵² Acts § 31-1-27(a). W. VA. CODE ANN. § 31-1-6 (1972 Replacement Volume). The requirement in the present Act that the name and address of the one who prepared the articles appear therein has also been omitted from the pending Act.

⁵³ Acts § 31-1-27(b).

⁵⁴ *Id.*

⁵⁵ Acts § 31-1-27. Under the current Act, a corporation cannot commence business unless a minimum amount of capital has been paid in. This amount must be stated in the articles of incorporation. W. VA. CODE ANN. § 31-1-6(d)(3) (1972 Replacement Volume).

offers protection to the creditor nor would any creditor rely upon this minimal capital to extend credit.⁵⁶ The articles of incorporation for a nonprofit corporation may include, in addition to those provisions required for all corporations, any clause for the regulation of the internal affairs of the corporation, including a plan for distribution of assets upon the dissolution or final liquidation.⁵⁷

After the articles of incorporation have been drafted, the incorporators must sign and deliver them in duplicate to the Secretary of State.⁵⁸ After the articles are approved by the Secretary, the papers will be dated and marked "Filed." The Secretary of State will retain one of the copies for his files and will send the other copy, to which is affixed a certificate of incorporation, to the incorporators. Upon receipt from the Secretary of State, the corporation must file the articles of incorporation and certificate of incorporation with the clerk of the county court where its principal office is located. If the corporation's principal office is not in West Virginia, and the corporation transacts business in the State, the articles of incorporation and certificate must be recorded in the county where the corporation transacts its principal business. If the corporation has no principal office in the State, nor transacts any business here, the articles of incorporation and certificate of incorporation need not be recorded.⁵⁹

The corporate existence begins upon issuance of the certificate of incorporation, and such certificate is conclusive evidence that the corporation has complied with all the statutory conditions for valid incorporation. However, this conclusive presumption is not binding upon the State in a proceeding either to revoke the charter or to implement an involuntary dissolution.⁶⁰

The West Virginia practitioner will have little difficulty following the new incorporation procedures since there is no substantial change from the current practice. Even so, the pending Act's

⁵⁶ See Note, *Statutory Minimum Capitalization Requirements*, 5 WILLAMETTE L.J. 331 (1969).

⁵⁷ Acts § 31-1-27(c). In establishing its articles of incorporation, a nonprofit corporation must also comply with certain Internal Revenue Regulations if it is to achieve a tax exempt status. INT. REV. CODE OF 1954, § 501.

⁵⁸ Acts § 31-1-26. The current Act only requires that one copy of the articles of incorporation be sent to the Secretary of State. W. VA. CODE ANN. § 31-1-6 (1972 Replacement Volume).

⁵⁹ Acts § 31-1-28(b).

⁶⁰ Acts § 31-1-29.

provisions for incorporation are beneficial in that they clarify the steps to be taken.

After the Secretary of State has issued the certificate of incorporation, an organizational meeting must be held.⁶¹ If the articles of incorporation name the initial board of directors, they have a duty to call the organizational meeting. Otherwise, the duty falls upon either the shareholders, members, or incorporators named in the articles of incorporation. Unlike the current Act, the pending Act does not specify the time within which the meeting must be held.⁶² However in the case of a business corporation, if no meeting is held within thirteen months, a shareholder can compel one to be held.⁶³ The pending Act has an apparent mistake in that it states that the purpose of the organizational meeting is to adopt bylaws, elect officers, and elect a board of directors if not named in the articles of incorporation.⁶⁴ However, while this provision infers that the shareholders may adopt the original bylaws, section seventeen of the Act specifically grants the directors exclusive power to adopt the initial bylaws.⁶⁵ It is clear that those members, shareholders, or incorporators named in the articles of incorporation are entitled to at least three days notice by mail of such a meeting. However, this provision makes no requirement that the directors be so notified.⁶⁶ The apparent intent of this provision is that if the directors are not named in the original articles of incorporation, either the incorporators or shareholders named in the articles will hold an organizational meeting to elect the directors. After the directors are elected, the directors are to adopt the bylaws. If the directors are named in the articles of incorporation, there appears little need for the shareholders, members, or incorporators to be notified of the organizational meeting. However, the pending Act does not make this clear. The complexities of this provision apparently stem from the fact that the Model Act re-

⁶¹ Acts § 31-1-30.

⁶² The current Act requires that a majority of incorporators call an organizational meeting within six months of the issuance of the certificate of incorporation. W. VA. CODE ANN. § 31-1-9 (1972 Replacement Volume).

⁶³ Acts § 31-1-18 allows a shareholder to petition a circuit court to force an annual meeting. Although an annual meeting is different than the organizational meeting, the shareholders could elect a board of directors at the annual meeting who in turn could adopt bylaws. The pending Act offers no similar protection to members of a nonprofit corporation.

⁶⁴ Acts § 31-1-30.

⁶⁵ See the discussion in the text accompanying note 70 *infra*.

⁶⁶ *Id.*

quires that directors be named in the articles of incorporation, and for that reason, only require attendance and notification of the directors for the organizational meeting.⁶⁷

Obviously the pending provision as written needs to be changed. Adoption of the Model Act's provision would appear to be best. However, if this is not desired, the pending provision should be amended to clearly provide who must attend the organizational meeting and the parties having a right to vote.

III. THE CORPORATE OPERATION

A. Bylaws

It is a fundamental principle of corporation law that a majority of shareholders may establish rules and regulations for the corporation, subject only to a legislative act.⁶⁸ The current West Virginia statute dealing with bylaws recognizes this principle, as it reserves the right to make and alter bylaws to the stockholders, subject to a contrary provision in the charter.⁶⁹ The pending Act, however, denotes a substantial departure from the current law. It gives to the board of directors the power to adopt the initial bylaws of a corporation and the power to amend or repeal bylaws in the absence of a reservation of this power to the shareholders in the articles of incorporation.⁷⁰ This grant of power to the board of directors gives rise to a dispute as to whether there exists a danger of usurpation of shareholder control.⁷¹

On the one hand, this section in the pending Act is a simple, direct, and unequivocal statement of who has the power to adopt or repeal the bylaws, both initially and subsequently. The section

⁶⁷ See 2 MODEL BUS. CORP. ACT ANN. §§ 54, 57 (2d ed. 1971).

⁶⁸ 4 M.J. Corporations § 44 (1949). See *Gottlieb v. Economy Stores*, 199 Va. 848, 102 S.E.2d 345 (1958).

⁶⁹ W. VA. CODE ANN. § 31-1-19 (1972 Replacement Volume).

⁷⁰ Acts § 31-1-17. But see Acts § 31-1-30 which provides that a majority of the directors or a majority of shareholders, members, or incorporators named in the articles shall call an organizational meeting for the purpose of adopting bylaws and electing officers and a board of directors. This section may create a potential conflict with Acts § 31-1-17, as it implies that the power of adopting bylaws could be exercised by persons other than the board of directors.

⁷¹ See *Scott County Tobacco Warehouses, Inc. v. Harris*, 201 S.E.2d 780, 782 (Va. 1974), in which the court upheld shareholder action in removing incumbent directors and electing a new board of directors where a bylaw provided the directors an opportunity to usurp shareholder control of certain business matters in violation of a Virginia statute.

is consistent with the modern trend in corporation statutes to vest such power in the board of directors⁷² and to recognize that bylaws are usually drawn by counsel for the directors without shareholder participation.⁷³ Moreover, it is the view of at least one source that bylaws have largely become unnecessary due to the presence of complementary corporation statutes which restrict the breadth and extent of most of the traditional subject matter of bylaws.⁷⁴ Finally, even though the power to adopt, amend, or repeal bylaws is delegated to the board of directors, this delegation is still subordinate to the inherent power of the shareholders, the ultimate owners of a corporation, to subject the bylaws of the directors to alteration or repeal.⁷⁵

Critics of the pending provision on bylaws will quickly recognize that its language is unambiguous. However, it is this lack of ambiguity that is most distressing. The section clearly grants the directors the power to adopt the initial bylaws. While this power is absolute, the power to alter, amend, or repeal bylaws or adopt new bylaws is subject to repeal or change by action of the shareholders. Whether the shareholders can effectively exercise this inherent authority to repeal or change director action in altering, amending, or repealing existing bylaws or adopting new bylaws

⁷² See 1 MODEL BUS. CORP. ACT ANN. § 27, ¶ 2 (2d ed. 1971). Acts § 31-1-17 is identical to this section in the Model Business Corporation Act.

⁷³ Emerson, *Vital Weaknesses in the New Virginia Stock Corporation Law and the Model Act*, 42 VA. L. REV. 489, 511 (1956).

⁷⁴ Gibson, *The Virginia Corporation Law of 1956*, 42 VA. L. REV. 445, 461 (1956). The pending West Virginia Corporation Act contains a number of provisions limiting the scope of bylaws, including, but not limited to, the following: indemnification of officers, directors, employees, and agents (Acts § 31-1-9); meetings of shareholders or members (Acts § 31-1-18); notice of shareholders' or members' meetings (Acts § 31-1-19); quorum of shareholders or members (Acts § 31-1-20); number and election of directors and classification of directors (Acts § 31-1-21); vacancies in the board of directors and the manner of filling them (Acts § 31-1-22); quorum of directors (Acts § 31-1-23); place and notice of directors' meetings (Acts § 31-1-24); action by directors without a meeting (Acts § 31-1-25); and officers and their removal (Acts § 31-1-104). See also *Scott County Tobacco Warehouses, Inc. v. Harris*, 201 S.E.2d 780 (Va. 1974), in which the Virginia court discusses VA. CODE ANN. § 13.1-36 (1973 Replacement Volume), which is identical to Acts § 31-1-21. This provision prevents the directors from curtailing the terms of duly elected officials by amending the bylaws. In this way, a board's ability to alter its composition between annual meetings is restricted.

⁷⁵ Emerson, *supra* note 21, at 512. See *Rogers v. Hill*, 289 U.S. 582, 589 (1933), in which the Supreme Court stated: "That the statute did not intend to divest stockholders is clear; for it expressly makes bylaws passed by directors subject to alteration and repeal by the stockholders."

depends upon the existence of restrictions in the initial bylaws on shareholder meetings. Since the directors are virtually unrestrained in their adoption of initial bylaws, provisions could be enacted establishing quorum and vote requirements for shareholder meetings. The new corporation Act prescribes the *sine qua non* for shareholders' quorum and vote at meetings, but adds that such requisites are always subject to greater proportions if stipulated by the articles of incorporation or bylaws.⁷⁶ In the initial bylaws, then, the directors could state that the shareholders need more than a majority to defeat the directors' bylaws, and, with a fixed shareholder quorum or vote requirement by bylaw, they could easily defeat the will of the majority of the shareholders. The directors could also put other items of business basic to shareholder protection in the initial bylaws, leaving the shareholders without a remedy.⁷⁷ Thus, even the addition of minimum quorum and vote requirements by the pending Act will do little to limit the power of the board of directors to govern the corporation by the bylaws.

Virginia, which has a bylaws statute similar to the pending provision, attempted to protect the shareholders and codify previous case law⁷⁸ by inserting the following language in the statute:

But bylaws made by the board of directors may be repealed or changed, and new bylaws made, by the stockholders and the stockholders may prescribe that any bylaw made by them shall not be altered, amended or repealed by the directors.⁷⁹

Even though this sentence grants to the shareholders the right to alter or repeal all bylaws, including those initially adopted, it is still seen as a feeble endeavor⁸⁰ because the problems of share-

⁷⁶ Acts § 31-1-20.

⁷⁷ Emerson, *supra* note 21, at 512-13. Other matters of vital importance to the shareholders not subject to protective provisions include: the election or appointment of officers, the calling of special meetings of shareholders in a manner otherwise than as provided by statute, the number of directors after the first board of directors, and penalties for failure to pay installments or calls for subscriptions to shares.

⁷⁸ *Stevens v. Davison*, 59 Va. (18 Gratt.) 819, 827 (1868), held that even though directors can alter or amend bylaws, they have no authority to disregard or alter another bylaw which was intended to impose a limitation on their powers.

⁷⁹ VA. CODE ANN. § 13.1-24 (1973 Replacement Volume).

⁸⁰ Emerson, *supra* note 21, at 511. The case of *Scott County Tobacco Warehouses, Inc. v. Harris*, 201 S.E.2d 780 (Va. 1974) recognized this still existing danger. See discussion in *supra* note 21.

holder quorum and vote requirements—the modes of questioning bylaws—are not dealt with.

The final sentence of the pending section allows the bylaws to contain any provisions for the regulation and management of corporate affairs that are not inconsistent with law or the articles of incorporation. The contents of the bylaws thus remain as flexible and as unrestricted as the law permits.⁸¹

In conclusion, it can be seen that these provisions will substantially change the pre-existing law in this area. The power to make and alter bylaws has been transferred from the shareholders to the board of directors. Because the methods available to shareholders to change or repeal these bylaws are limited, there exists a serious potential for abuse of this power by directors and a danger of usurpation of shareholder control. A provision establishing that the requisite quorum or vote majority is not subject to change by the directors⁸² or a legislative amendment similar to the Virginia provision, or both, is needed.

B. Shareholders

The pending West Virginia Corporation Act provides that meetings of shareholders may be held at the time and place, either within or without the State, as may be specified in the bylaws.⁸³ Absent specific bylaw provision, the pending Act designates the principal office of the corporation as the location of shareholders' meetings.⁸⁴ This is in conformity with prior West Virginia law.⁸⁵

⁸¹ 1 MODEL BUS. CORP. ACT ANN. § 27, ¶ 2 (2d ed. 1971). The requisites for the validity of bylaws are discussed in *State ex rel. Syphers v. McCune*, 143 W. Va. 315, 101 S.E.2d 834 (1958), in which the court ruled that a corporate bylaw providing for the election of directors on a staggered basis violated the rights of cumulative voting and was invalid. Bylaws cannot conflict with laws of the state or the United States, and the power to make reasonable bylaws consistent with its charter inheres in every corporation. *Gottlieb v. Economy Stores*, 199 Va. 848, 856-57, 102 S.E.2d 345, 352 (1958). See text accompanying note 22, *supra*.

⁸² Emerson, *supra* note 21, at 512.

⁸³ Acts § 31-1-18(a). Some states require that shareholders' meetings be held within the state of incorporation on the theory that a state is unable to confer upon a corporation powers exercisable beyond state boundaries. Approximately three-fourths of the states permit the holding of meetings of shareholders either within or without the state. 1 MODEL BUS. CORP. ACT ANN. § 28, ¶ 4.01 (2d ed. 1971). See Note, *Stock Corporation Law, § 45 Amended—Place of Shareholder Meeting*, 21 ALBANY L. REV. 332-33 (1957).

⁸⁴ Acts § 31-1-18(a).

⁸⁵ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

The pending Act requires the holding of an annual meeting.⁸⁶ The current law allows meetings to be held more than one year apart, provided the time for shareholders' meetings is specified in the bylaws, and the interval between meetings is deemed "regular."⁸⁷ Absent specification in the bylaws, however, the present Act provides for an annual meeting.⁸⁸ The pending Act requires the holding of the annual meeting at the time specified in the bylaws. Although failure to hold the shareholders' meeting at the stated time or within any thirteen month period will not result in a forfeiture or dissolution of the corporation;⁸⁹ such failure in the case of a business corporation will create a right in any shareholder to apply to the circuit court of the county wherein the corporation's principal office is located⁹⁰ for an order summarily directing that a shareholders' meeting be held.⁹¹ This provision is new to West Virginia corporation law. Application for a similar order directing that a meeting of members be conducted is not authorized by the pending Act in the case of nonprofit corporations.⁹²

The pending Act permits greater flexibility than current West Virginia law in designating the individuals authorized to call a special meeting of the shareholders. Special meetings of shareholders of business corporations may be called by the board of directors, by the holders of not less than ten percent of all shares entitled to vote at the meeting, or "such other persons as may be authorized in the articles of incorporation or the bylaws."⁹³ Special meetings of the members of a nonprofit corporation may be called by its president or by its board of directors or by "such other officers or persons or number or proportion of members as may be provided in the provision fixing the . . . members entitled to call a meeting."⁹⁴ Absent such provision in the articles of incorporation or bylaws, the pending Act grants authority to call special meet-

⁸⁶ Acts § 31-1-18(b).

⁸⁷ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

⁸⁸ *Id.* An annual meeting held on the fourth Tuesday of January is prescribed.

⁸⁹ Acts § 31-1-18(b).

⁹⁰ If the corporation maintains its principal office outside of West Virginia, the shareholder must apply to the circuit court of Kanawha County. Acts § 31-1-18(c).

⁹¹ *Id.* Absent such provision, mandamus would be the proper remedy to compel the holding of shareholders' meetings. *Walsh v. State ex rel. Cook*, 199 Ala. 123, 74 So. 45 (1917); *People ex rel. Young v. Trustees*, 51 Ill. 149 (1869). See Annot., 48 A.L.R.2d 615 (1956).

⁹² Acts § 31-1-18(c).

⁹³ Acts § 31-1-18(d).

⁹⁴ Acts § 31-1-18(e).

ings to members having one-twentieth of the votes entitled to be cast at the meeting.⁹⁵ Current West Virginia law makes no distinction between business and nonstock corporations in the authority to call special meetings of shareholders or members, nor does it provide for designation of particular individuals authorized to call special meetings in the bylaws or charter.⁹⁶ Current law limits the number of individuals authorized to call special meetings of the shareholders to the corporation's board of directors, its president and secretary, and those holding one-tenth of the shares outstanding.⁹⁷ Unlike the pending Act, current West Virginia law does not require that the group of shareholders entitled to call a special meeting be voting shareholders.

The pending Act substantially changes the time within which notice of shareholders' meetings must be given and the proper form of such notice. It requires written notice⁹⁸ stating the time and place of the meeting—and in the event of a special meeting, the purpose of the meeting⁹⁹—to be delivered either personally or by mail not less than ten days nor more than fifty days before the meeting is to be held.¹⁰⁰ The current West Virginia law provides for

⁹⁵ *Id.*

⁹⁶ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

⁹⁷ *Id.* Shareholders are authorized to call special meetings of their body in thirty states, including West Virginia. In many states, including West Virginia, a certain percentage of shareholders must desire a meeting before one can be called. See 1 MODEL BUS. CORP. ACT ANN. § 28, ¶ 2.05 (2d ed. 1971).

⁹⁸ Acts § 31-1-19. Notice by publication is not sufficient when the statute requires personal service or service by mail. *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36 (1892). Notice signed by one without authority is void. *Reilly v. Oglebay*, 25 W. Va. 36 (1884). The pending Act provides for waiver of notice to shareholders. Acts §§ 31-1-72, -73.

⁹⁹ Acts § 31-1-19. A statement of business to be transacted is not necessary in notice of an annual meeting, since it is lawful to transact all business pertaining to corporate interests at the annual meeting. *Warner v. Mower*, 11 Vt. 385, 391 (1839). Unusual business to be conducted at an annual meeting must be stated in the notice. *Johnson v. Tribune-Herald Co.*, 155 Ga. 204, 116 S.E. 810 (1923); *Des Moines Life & Annuity Co. v. Midland Ins. Co.*, 6 F.2d 228 (D.C. Minn. 1925). See also Note, *Notice and Quorum Requirements for Shareholder Meetings*, 24 U. CIN. L. REV. 578 (1955).

¹⁰⁰ All but ten states' corporation statutes have notice provisions. 1 MODEL BUS. CODE ANN. § 27, ¶ 2.02 (2d ed. 1971). Notice is essential to the validity of action taken by shareholders. Power existing in the shareholders of a corporation cannot be exercised in the absence of any shareholder unless all had notice and an opportunity to be present. *Reilly v. Oglebay*, 25 W. Va. 36 (1884). A shareholder who is present and participates in a meeting is estopped to deny the legality of the meeting. *Germer v. Triple-State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S.E. 509

specification of the time and form of notice in the bylaws.¹⁰¹ Absent such a provision in the bylaws, current law requires written notice to the shareholders not less than ten days prior to the meeting (not less than five days for a special meeting); such notice may currently be given either by delivery or by publication.¹⁰² Notice by publication is not sufficient under the pending Act.¹⁰³ Like the present provision, action may be taken without notice of the meeting if all shareholders give written waiver of notice.¹⁰⁴

The pending Act provides that unless otherwise specified in the articles of incorporation, a majority of shares of a business corporation entitled to vote and represented in person or by proxy shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting.¹⁰⁵ This authorizes the reduction of a quorum below a majority of shares entitled to vote by the inclusion of such a provision in the corporation's charter. The ability to lower the quorum requirement in this manner to less than a majority of those entitled to vote will be new to West Virginia law, which currently prescribes that only a majority of those entitled to vote constitutes a quorum.¹⁰⁶ The pending provision allows greater flexibility in corporate organization and facilitates the transaction of corporate business requiring shareholder approval. Nevertheless, sufficient safeguards for shareholders' interests do exist in the statute's limitation against the reduction of quorum below one-third of the shareholders entitled to vote at the meeting.¹⁰⁷

In the case of a nonprofit corporation, the percentage of members which constitutes a quorum may be specified in the bylaws under the pending Act.¹⁰⁸ However, there is no limit on the number of members that must be present to constitute a quorum for nonprofit corporations.¹⁰⁹ Absent a provision in the bylaws, the Act

(1903). Compliance with statutory notice provisions is essential. Good faith attempt to comply will often be insufficient to constitute proper notice. *Home State Bank v. Swartz*, 77 Mont. 566, 252 P. 366 (1926).

¹⁰¹ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

¹⁰² *Id.*

¹⁰³ Acts § 31-1-19.

¹⁰⁴ Acts § 31-1-73. This section is very much like the present provision. W. VA. CODE ANN. § 31-1-68 (1972 Replacement Volume).

¹⁰⁵ Acts § 31-1-20.

¹⁰⁶ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

¹⁰⁷ Acts § 31-1-20.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

fixes the quorum for meetings of members of nonprofit corporations at one-tenth of the votes entitled to be cast at the meeting.¹¹⁰ Present West Virginia law does not allow a provision for less than a majority quorum.¹¹¹ The value of this change allowing less than a majority quorum, particularly with respect to nonprofit corporations, is that it will permit the members or shareholders to determine through the bylaws the extent to which business may be lawfully conducted in their absence. This will be particularly beneficial in the case of corporations in which a substantial portion of the members or shareholders are only passively interested.

The pending Act provides that if a quorum is present, a majority of shares represented or present at the meeting that are entitled to vote on the subject matter is necessary to pass a shareholder resolution unless the vote of a greater number or voting by classes is required by the charter or bylaws of the corporation.¹¹² This is in conformity with current West Virginia law.¹¹³

Under the pending Act, each outstanding share of stock is entitled to one vote on each matter submitted for consideration at a meeting of the shareholders unless otherwise provided in the articles of incorporation. However, neither treasury shares, nor shares held by another corporation, if a majority of the shares entitled to vote for election of directors of such other corporation is held by the corporation, shall be voted or computed in determining the number of outstanding shares at any given time.¹¹⁴ The authority to place provisions in the charter for nonvoting shares is available under current West Virginia law.¹¹⁵ Likewise, the limita-

¹¹⁰ *Id.*

¹¹¹ W. VA. CODE ANN. §§ 31-1-6(j), -21 (1972 Replacement Volume).

¹¹² Acts § 31-1-20.

¹¹³ W. VA. CODE ANN. § 31-1-6(j) (1972 Replacement Volume).

¹¹⁴ Acts § 31-1-93.

¹¹⁵ W. VA. CODE ANN. § 31-1-38 (1972 Replacement Volume). State *ex rel.* Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956), held unconstitutional a charter provision authorizing the issuance of non-voting shares in violation of W. VA. CONST. art. XI, § 4, which, in 1956, required that all stockholders of a corporation be entitled to vote at meetings of shareholders. That constitutional provision was amended November 4, 1958, to authorize the issuance of non-voting shares of stock. See, Note, *The Status of Nonvoting Stock in West Virginia*, 59 W. VA. L. REV. 374 (1957). Thus, charter provisions authorizing the election of one director by the preferred class of stock and the other directors by the common class have been upheld. *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961), *commented on in* 64 W. VA. L. REV. 224 (1962). See also 60 W. VA. L. REV. 203 (1958) and Goodwin, *Blue Sky Law—West Virginia Securities Laws*

tion against the right to vote or count as shares outstanding treasury shares and shares held by another corporation also exists in current West Virginia law.¹¹⁶

The shareholders right to cumulative voting for directors, now recognized by West Virginia statute¹¹⁷—and mandated by state constitution¹¹⁸—is continued in the pending Act for both business¹¹⁹ and nonprofit corporations.¹²⁰

The pending Act provides that a shareholder may vote his shares by person or proxy executed in writing by the shareholder or by the attorney in fact of the shareholder.¹²¹ Execution of a proxy by the attorney in fact of the shareholder is not currently provided for by West Virginia statute.¹²² The addition of this provision enhances the ability of management to successfully solicit proxies from shareholders otherwise unable to execute their proxy due to incompetency or absence from the country and facilitates the transaction of corporate business requiring shareholder approval.

The duration of a proxy, for both business and nonprofit corporations, under the pending Act is eleven months from the date of its execution, unless otherwise provided in the proxy.¹²³ Under current law, a proxy is valid to confer voting rights upon another for three years following its execution, unless a longer period is otherwise specified in the proxy.¹²⁴ This change in the law will

and the Promoter, 73 W. VA. L. REV. 11, 31 (1970). At common law a shareholder was entitled to one vote per person. *E.g.*, *Commonwealth ex rel. Nickerson v. Conover*, 10 Phila. 55 (Pa. 1873). The common law rule has been changed in most states and by judicial decision to base voting power upon share ownership. *E.g.*, *Commonwealth v. Smith*, 37 Pa. County Ct. 625 (1910).

¹¹⁶ W. VA. CODE ANN. § 31-1-38 (1972 Replacement Volume).

¹¹⁷ *Id.* § 31-1-66.

¹¹⁸ Cumulative voting is constitutionally mandated in West Virginia. W. VA. CONST. art. XI, § 4. *Cross v. West Virginia Cent. & Pac. Ry.*, 35 W. Va. 174, 12 S.E. 1071 (1891). Notwithstanding charter or bylaw provision to the contrary, cumulative voting is available to holders of both preferred and common stock. Staggered voting of directors violates the shareholder's right to cumulative voting. *State ex rel. Syphers v. McCune*, 143 W. Va. 314, 101 S.E.2d 834 (1958). *See also* Note, *Cumulative Voting and Classified Directorates*, 64 W. VA. L. REV. 325 (1962); Mills, *Mathematics of Cumulative Voting*, 1968 DUKE L.J. 28; Stephan, *Cumulative Voting and Classified Boards; Some Reflections on Wolfson v. Avery*, 31 NOTRE DAME L. REV. 351 (1956).

¹¹⁹ Acts § 31-1-93.

¹²⁰ Acts § 31-1-138.

¹²¹ Acts § 31-1-93.

¹²² *See* W. VA. CODE ANN. § 31-1-66 (1972 Replacement Volume).

¹²³ Acts §§ 31-1-93, -138.

¹²⁴ W. VA. CODE ANN. § 31-1-67 (1972 Replacement Volume).

require periodic re-execution of the proxy, but this will encourage annual evaluation of corporate affairs by the shareholders. Management, perhaps, will be more burdened with the solicitation of proxies than under the three year limitation, but the increased contact with the shareholders and the more frequent accountability of management to the shareholders should improve the management-shareholder relationship.¹²⁵

Voting by proxy is expressly made available in the pending Act for shares owned by other corporations. It provides that shares owned by other corporations may be voted by officers or proxy as provided in the bylaws of the other corporations, or absent such provision, as the board of directors of the other corporation may determine.¹²⁶ Voting by proxy of the shares owned by another corporation is currently only implicitly authorized.¹²⁷

Executors, administrators, guardians, committees, curators, and conservators may vote, in person or by proxy, those shares held by them without transferring the shares into their own name.¹²⁸ Most other parties holding the stock of another are required to have the shares transferred to their own name before voting them.¹²⁹ A trustee may vote the shares in his trust but must have them transferred into his own name.¹³⁰ A receiver can vote without transfer only upon the receipt of a court order appointing him and authorizing the voting of the shares by him;¹³¹ a pledgor is entitled to vote shares pledged until transferred into the name of the pledgee.¹³² This is in conformity with current West Virginia law which

¹²⁵ The right of a shareholder freely to select the person to vote his proxy may not be curtailed or restricted by law. *State ex rel. Syphers v. McCune*, 143 W. Va. 314, 101 S.E.2d 834 (1958). Generally, no particular formality is necessary to proxy solicitation as long as sufficient written evidence exists of its authorization. *McDonough v. Kellogg*, 295 F. Supp. 594, (W.D. Va. 1969). See Oulahan, *Some Practical Problems Involved in Proxy Solicitation and Counting under Virginia Law*, 8 WM. & MARY L. REV. 185 (1967); Giroir, *Proxy & Insider-Trading Regulation: Federal-State Co-operation in the Protection of Investors*, 19 ARK. L. REV. 308 (1966); Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041 (1960); Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249 (1960).

¹²⁶ Acts § 31-1-93.

¹²⁷ Section 31-1-65 of the present act provides for ownership of shares by a corporation with the privilege to vote and "exercise all rights of ownership." Apparently the right to vote by proxy is considered an incidental right of ownership under current law. See W. VA. CODE ANN. § 31-1-66 (1972 Replacement Volume).

¹²⁸ Acts § 31-1-93.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

provides that "[t]he person in whose name shares of stock stand in the books of the corporation shall be deemed the owner thereof so far as the corporation is concerned."¹³³ The provision of the pending Act exempting the personal representative of a deceased stockholder from the duty to transfer stock into his own name exists in the current Act, but such an exemption for guardians, committees, and curators is new to West Virginia law.¹³⁴

The right to vote redeemable shares ceases, under the pending Act, upon the date that written notice of redemption has been mailed to the holders of the shares and a sum sufficient to redeem has been deposited with a bank or trust company that has the irrevocable instruction and authority to pay the redemption price of the shares upon surrender of the certificates.¹³⁵

A pre-emptive right is a judicial doctrine that gives shareholders of a corporation the first choice to purchase shares of additional issuances of corporate stock in order to maintain their proportionate share of the corporation.¹³⁶ Under the pending corporation Act, shareholders' pre-emptive rights to subscribe to or acquire *unissued* or treasury shares may be denied or limited by provision in the articles of incorporation.¹³⁷ Under current law the pre-emptive right can be limited by charter provision only as to *additional* issues of stock.¹³⁸ The current Act authorizes denial of

¹³³ W. VA. CODE ANN. § 31-1-38 (1972 Replacement Volume).

¹³⁴ *Id.*

¹³⁵ Acts § 31-1-93. "Redemption of redeemable shares frequently occurs in conjunction with a corporate transaction, such as the issuance of a new class of shares, the incurring of a debt, or a combination with another corporation." 1 MODEL BUS. CORP. ACT ANN. § 33, Par. 9, ¶ 2 (2d ed. 1971).

¹³⁶ Drinker, *The Pre-emptive Right of Shareholders to Subscribe to New Shares*, 43 HARV. L. REV. 586 (1930). Pre-emptive rights were recognized in *Thurmond v. Paragon Colliery Co.*, 82 W. Va. 49, 95 S.E. 816 (1918) and *Hall v. McLuckey* 135 W. Va. 864, 65 S.E.2d 494 (1951). Denial of the pre-emptive right entitles the shareholder to damages equal to the excess of value over subscription price of shares which the shareholder was entitled to purchase but which were sold to others. *Gray v. Portland Bank*, 3 Mass. 363 (1807); *accord*, *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906). A pre-emptive right is an equity inherent in stock ownership, a quality inseparable from capital interest represented by the old stock. *Miles v. Safe Deposit & Trust Co.*, 259 U.S. 247 (1922). See *Adams, Remedy for Denial of Stockholders Pre-emptive Right*, 6 N.Y.U. INTRA. L. REV. 126 (1951); Drinker, *The Pre-emptive Right of Shareholders to Subscribe to New Shares*, 43 HARV. L. REV. 583 (1930); Frey, *Shareholders' Pre-emptive Rights*, 38 YALE L.J. 563 (1929).

¹³⁷ Acts § 31-1-90.

¹³⁸ W. VA. CODE ANN. § 31-1-6(i) (1972 Replacement Volume).

the pre-emptive right by charter provision as to additional issuances but not as to unissued shares of the original authorization. The pending Act on the other hand authorizes the denial of the pre-emptive right only to unissued shares and, by *inclusio unius est exclusio alterius*,¹³⁹ does not authorize denial or limitation of the pre-emptive right to purchase additional shares. Thus the pending Act should be amended to include, as did the prior West Virginia corporation act, the authority to deny the pre-emptive right to purchase additional issues of stock.

The pending Act does not change the current limitation against shareholders' liability to the corporation or its creditors. Subscribers and shareholders are not liable to the corporation or its creditors beyond the obligation to pay to the corporation full consideration for the shares issued, or to be issued, to the shareholder.¹⁴⁰ The Act continues the exemption from personal liability of those persons holding shares for the benefit of another: executors, administrators, guardians, trustees, assignees for the benefit of creditors, and pledgees.¹⁴¹ But, the estate or funds held by these individuals remain liable to the corporation as a shareholder.¹⁴² Thus, the unpaid balance due the corporation shall be satisfied from the funds held by such trustee, administrator, or pledgee without the imposition of personal liability upon him.

Unlike current corporation law, the pending Act exempts a good faith assignee or transferee from liability for value of the unpaid consideration if the assignee or transferee receives stock without notice or knowledge that full consideration for the shares has not been paid.¹⁴³ Like the bona fide purchaser defense, this provision will provide a measure of security to purchasers of stock against incurring unexpected liability. Members of nonprofit corporations, similarly, are not liable for the obligations of the corporation under the pending Act.¹⁴⁴

Under current West Virginia law,¹⁴⁵ a shareholder may bring

¹³⁹ The inclusion of one is the exclusion of another. BLACK'S LAW DICTIONARY 906 (4th ed. 1951).

¹⁴⁰ Acts § 31-1-89.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Acts § 31-1-137.

¹⁴⁵ The shareholders' right to maintain a derivative action exists in West Virginia common law. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 63 S.E. 613 (1909). There is currently no West Virginia statute dealing with shareholders' derivative

a derivative action to enforce a secondary right¹⁴⁶ on the part of one or more shareholders of the corporation if the corporation refuses to assert rights which may be properly asserted by it. Current law requires that the complaint commencing a derivative suit be certified,¹⁴⁷ state with particularity the plaintiff's efforts to secure relief through the directors¹⁴⁸ or through a meeting of the shareholders,¹⁴⁹ and the reasons for failure either to obtain such relief or to make such effort.¹⁵⁰

A shareholder may maintain a derivative suit, under current law, even though the wrongful transaction of which the shareholder complains prior to the acquisition of stock by the complainant, provided the shares were not purchased in bad faith or for the sole purpose of engaging in litigation.¹⁵¹ The pending Act requires share ownership contemporaneous with the alleged improper transaction, either by the complainant himself or by one through whom complainant's ownership devolved by operation of law.¹⁵² This change in West Virginia law will unnecessarily deprive share-

actions. Procedural requirements of derivative actions are found in W. VA. R. CIV. P. 23(b) and FED. R. CIV. P. 23.1. See M. LUGAR & L. SILVERSTEIN, *WEST VIRGINIA RULES OF CIVIL PROCEDURE* 200-01 (1960). See also Note, *Derivative Stockholder's Suits in West Virginia*, 44 W. VA. L.Q. 129 (1938); Note, *Separate Recovery in Stockholder's Derivative Suit*, 49 W. VA. L.Q. 176 (1943).

¹⁴⁶ An action is derivative as to the shareholder when wrongful acts or transactions have caused direct injury to the corporation and indirect injury to the shareholder, for example, by lost dividends or the depletion of corporate assets. Where the corporation having the primary right refuses to enforce that right, the shareholders become entitled to enforce it. See M. LUGAR & L. SILVERSTEIN, *supra* note 1, at 200-01.

¹⁴⁷ W. VA. R. CIV. P. 23(b).

¹⁴⁸ *Id.* A demand upon the directors to enforce the rights of the corporation must be made to maintain a derivative action, unless the directors are the alleged wrongdoers, in which case a demand would be futile. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 724, 63 S.E. 613, 615 (1909). A demand upon the directors is also unnecessary where the corporation has abandoned doing business. *Crumlish's Adm'r v. Shenandoah Valley R.R.*, 28 W. Va. 623, 633 (1886).

¹⁴⁹ *Rathbone v. Gas Co.*, 31 W. Va. 798, 809, 8 S.E. 570, 575 (1888). Plaintiff must show that a majority of shareholders have been appealed to and that they have wrongfully refused to act or that the shareholders themselves are guilty of misconduct so as to render an appeal to the shareholders futile. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 724, 63 S.E. 613, 615 (1909).

¹⁵⁰ W. VA. R. CIV. P. 23(b).

¹⁵¹ *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W. Va. 639, 655, 57 S.E.2d 736, 746 (1950).

¹⁵² Acts § 31-1-103(a). Contemporaneous ownership is required to maintain a shareholders' derivative action in a majority of jurisdictions, H. HENN, *LAW OF CORPORATIONS* 764-65 (2d ed. 1970), and in all federal courts, FED. R. CIV. P. 23.1.

holders purchasing without knowledge of the wrongful transactions of the opportunity to protect their investment through the maintenance of a derivative suit.

If the purpose of a contemporaneous ownership requirement is to prevent strike litigation, that purpose is adequately served by case law and other provisions of the pending Act. West Virginia common law precludes commencement of a derivative action by one who purchases shares in bad faith or for the sole purpose of litigation.¹⁵³ The pending Act provides further assurance against strike litigation. Shareholders owning less than five percent of the shares outstanding in any class of stock may be required to give security for expenses in a derivative action, unless the stock held has a market value in excess of twenty-five thousand dollars. Additionally, upon a final judgment and a finding that the action was brought without reasonable cause, a court having jurisdiction may require the plaintiff to pay to the named defendants the reasonable expenses, including attorney fees, incurred in defense of the action.¹⁵⁴

If the justification for a contemporaneous stock ownership requirement is that the prior owner of the shares ratified the wrongful transaction by sale of the shares,¹⁵⁵ that justification must fail since the ratification theory was rejected by the West Virginia court in *Bank of Mill Creek v. Elk Horn Coal Corp.*¹⁵⁶ *Bank of Mill Creek* adopted the view that the right to maintain a derivative action inures to the purchaser of stock.¹⁵⁷ The requirement of contemporaneous ownership should be deleted from the pending Act and that portion of the Act should be amended to codify existing West Virginia law.

¹⁵³ In the event that the pending Act is so amended, the federal rule of contemporaneous ownership may not be held applicable to a derivative action removed to federal court. An argument can be made that such application of the federal rules to dismiss a derivative suit for lack of contemporaneous ownership would unconstitutionally interfere with state substantive law. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer*, 380 U.S. 460 (1965).

¹⁵⁴ Acts § 31-1-103.

¹⁵⁵ See *Capitol Wine & Spirit Corp. v. Pokrass*, 277 App. Div. 184, 98 N.Y.S.2d 291 (1950), *aff'd* 98 N.E.2d 704 (1950).

¹⁵⁶ 133 W. Va. at 655, 57 S.E.2d at 746. The West Virginia court in *Bank of Mill Creek* embraced the rule and reasoning of *Pollitz v. Gould*, 202 N.Y. 11, 94 N.E. 1088 (1911), although recognizing that the decision had been modified in New York by statute. *Pollitz* rejected the ratification theory. *Id.* at 13, 94 N.E. at 1088.

¹⁵⁷ 133 W. Va. at 655, 57 S.E. at 746.

In contrast with current West Virginia law,¹⁵⁸ a provision in the articles of incorporation is not required by the pending Act for the authority to create a voting trust.¹⁵⁹ Under the pending Act, any number of shareholders may create a voting trust.¹⁶⁰ Two or more shareholders are currently required before a voting trust may be formed.¹⁶¹ Current law denies eligibility to form a voting trust to shareholders of banking institutions, indemnity companies, industrial loan companies, and insurance companies. There are no such exemptions in the pending Act; shareholders of any corporation who can meet the qualifications in the pending Act may form a voting trust.¹⁶²

The pending Act continues the ten year maximum limitation upon the duration of a voting trust.¹⁶³ Voting trust agreements must be in a writing specifying the terms and conditions of the trust, and a copy of the voting trust agreement is required by the pending Act to be filed in the principal office of the corporation.¹⁶⁴ The trustee must keep a record of the shares to which he holds legal title, including the names and addresses of the shareholders, and must file a copy thereof in the principal office of the corporation. The copies of the voting trust agreement and the trustees record of shareholders shall be subject to the right of inspection, in certain cases, by any shareholder or holder of record of a voting trust certificate. Filing of the trust agreement in the principal office of the corporation is not currently required.¹⁶⁵

The pending Act provides that voting agreements shall be valid and enforceable in accordance with their terms.¹⁶⁶ This provi-

¹⁵⁸ W. VA. CODE ANN. § 31-1-73 (1972 Replacement Volume).

¹⁵⁹ Acts § 31-1-94. A voting trust is a means by which shareholders combine to convey legal title, including the voting rights, to a trustee who shall vote the same together. The benefit of such a trust is that it enables small shareholdings to acquire greater control through combination. Early decisions found voting trusts illegal on the ground that separation of voting power from ownership was contrary to public policy. Most jurisdictions now approve the formation of voting trusts. 1 MODEL BUS. CORP. ACT ANN. § 34, ¶ 2 (2d ed. 1971).

¹⁶⁰ Acts § 31-1-94.

¹⁶¹ W. VA. CODE ANN. § 31-1-73 (1972 Replacement Volume).

¹⁶² Acts § 31-1-94.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ W. VA. CODE ANN. § 31-1-73 (1972 Replacement Volume).

¹⁶⁶ Acts § 31-1-94. Unlike a voting trust, a shareholder does not convey legal title by entering into a voting agreement. A voting agreement is generally devised to effect a specific allocation of representation on the board of directors. It generally applies to a single voting as opposed to a voting trust which may last ten years. 1 MODEL BUS. CORP. ACT ANN. § 34, ¶ 2 (2d ed. 1971).

sion is new to West Virginia law. Voting agreements are not subject to the restrictions imposed upon voting trusts.¹⁶⁷

C. Directors

In a corporation, as in any group acting as an entity, some form of government is necessary. The forms vary from the dictatorship of a sole proprietorship to an almost complete democracy in some nonprofit corporations. Business corporations have generally followed the long tradition of a representative form of government. The shareholders place the government of the corporation in an elected board of representatives, variously called directors, trustees, or governors. The custom has finally crystalized in the use of the term "board of directors."¹⁶⁸ The board of directors is usually given the authority to manage the business and affairs of the corporation.

The pending West Virginia Corporation Act provides that the business and affairs of a business corporation, unless otherwise provided in the articles of incorporation, shall be managed by a board of directors.¹⁶⁹ The pending Act does not allow the articles of incorporation of a nonprofit corporation to provide for any other type of management.¹⁷⁰ The present Act deals with this subject in two separate sections.¹⁷¹ Under the pending Act there are two additions not found in the current code. The first is that the board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation.¹⁷² The second is the right of a member of the board of directors to have his vote recorded in the minutes of the board of directors on issues coming before the board.¹⁷³

It has been held that the board of directors is, for all purposes of dealing with others, the corporation itself.¹⁷⁴ When convened as a board, all the directors being present and voting, they are the possessors of all the powers of the corporation. What they do as

¹⁶⁷ Acts § 31-1-94.

¹⁶⁸ 1 MODEL BUS. CORP. ACT ANN. § 35, ¶ 2 (2d ed. 1971).

¹⁶⁹ Acts § 31-1-95. This section is identical, except for the addition of the last sentence, to section thirty-five of the Model Business Corporation Act.

¹⁷⁰ Acts § 31-1-139.

¹⁷¹ W. VA. CODE ANN. §§ 31-1-16(a), -17 (1972 Replacement Volume).

¹⁷² Acts § 31-1-95.

¹⁷³ *Id.*

¹⁷⁴ *Berkeley County Court v. Martinsburg & Potomac Turnpike Co.*, 92 W. Va. 246, 115 S.E. 448 (1922).

agents or representatives of the corporation is deemed to be done by the corporation.¹⁷⁵ The board of directors has been held to have the power to borrow money,¹⁷⁶ to declare dividends,¹⁷⁷ and to enter into litigation.¹⁷⁸

The broad authority given the board of directors is exemplified by section 120 of the pending Act.¹⁷⁹ This section gives the board of directors, without any authorization or consent of the shareholders, the authority to sell, lease, exchange, or make any other disposition of all, or substantially all, the property and assets of a corporation in the usual course of its business. Thus in a real estate corporation, the board of directors may sell all the lots owned by the corporation without any authorization or consent of the shareholders, since the sale of real estate is the usual and regular course of business. This section also contains a provision that the board of directors, without the authorization or consent of the shareholders, may mortgage or pledge any or all property and assets of a corporation whether or not in the usual and regular course of business.

These transactions may be made upon such terms and conditions as the board of directors authorizes. The consideration for these dealings may consist in whole or in part of cash or other property, including shares, obligations, or other securities of any other corporation, domestic or foreign.

The current Act also contains a provision concerning the sale, lease, or exchange of all the property and assets of the corporation, but it makes no express distinction between disposition of assets within or without the regular course of business.¹⁸⁰ Under the current Act, the board of directors may make a disposition upon such terms and conditions and for such consideration as it shall deem expedient and in the best interests of the corporation. However, the disposition must be approved, at a stockholders meeting duly called for that purpose, by the affirmative vote of the holders of sixty percent of the stock issued and outstanding having voting

¹⁷⁵ *Id.* at 250, 115 S.E. at 450.

¹⁷⁶ *Hartley v. Ault Woodenware Co.*, 82 W. Va. 780, 785, 97 S.E. 137, 139 (1918).

¹⁷⁷ W. VA. CODE ANN. § 31-1-70 (1972 Replacement Volume); *Meadows v. Bradshaw-Diehl Co.*, 139 W. Va. 569, 81 S.E.2d 63 (1954).

¹⁷⁸ *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798, 805, 8 S.E. 570, 573 (1888).

¹⁷⁹ Acts § 31-1-120. This section is identical to section seventy-eight of the Model Business Corporation Act.

¹⁸⁰ W. VA. CODE ANN. § 31-1-64 (1972 Replacement Volume).

power or, in the alternative, by the written consent of the holders of sixty percent of the voting stock issued and outstanding. The present Act also provides that the articles of incorporation may require a vote of a larger proportion of the shareholders than provided by the statute. Thus, the pending Act in this instance allows greater flexibility and wider discretion in the board of directors.

The pending Act also contains limitations on the board of directors's exercise of authority. In the area of loans to employees and directors, the pending Act contains limiting provisions. A business corporation cannot lend money or use its credit to assist its directors without authorization in the particular case by its shareholders.¹⁸¹ In a business corporation, the board of directors may lend money and use its credit to assist any employee of the corporation including an employee who is a director, if the board decides that such loan or assistance may benefit the corporation. If the board of directors decides to make a loan to an employee, the board would become liable to the corporation if the action was not prudent. When making each loan, the board must decide the security, if any, that is needed in the particular case.¹⁸² In a non-profit corporation, the pending Act does not allow loans to be made to its directors or officers.¹⁸³ If a director or officer assents to or participates in the making of such loan, he becomes liable to the corporation for the amount of the loan until it is repaid.¹⁸⁴

There are no similar provisions for the making of loans in the present Act. However, *Felsenheld v. Bloch Brothers Tobacco Co.*¹⁸⁵ held it not inherently wrong for the surplus funds of a corporation to be loaned to its officers or directors. Such transactions, of course, must be free from fraud; and, on behalf of the corporation, the matters must be determined by directors not interested in the loans.¹⁸⁶

The pending Act contains a provision¹⁸⁷ dealing with the number of directors. Under this provision, unlike the current Act,¹⁸⁸ the board of directors shall consist of one or more persons. The current

¹⁸¹ Acts § 31-1-101. This section is identical in wording to section forty-seven of the Model Business Corporation Act.

¹⁸² 1 MODEL BUS. CORP. ACT ANN. § 47, ¶ 2 (2d ed. 1971).

¹⁸³ Acts § 31-1-145.

¹⁸⁴ *Id.*

¹⁸⁵ 119 W. Va. 167, 192 S.E. 545 (1937).

¹⁸⁶ *Id.* at 175, 192 S.E. at 549.

¹⁸⁷ Acts § 31-1-21(a).

¹⁸⁸ W. VA. CODE ANN. § 31-1-16(b) (1972 Replacement Volume).

code requires at least three directors on the board unless the shares of the corporation are owned beneficially and of record by either one or two stockholders, in which case the number may be less than three but not less than the number of stockholders.

The manner for increasing and decreasing the number of directors is also contained in the pending Act; the number may be increased or decreased by amendment to or in any manner provided in the articles of incorporation or by the bylaws. A change in the number made by amendment to the bylaws shall control unless the articles of incorporation provide that a change in number can be made only by an amendment to the articles of incorporation. No decrease in the number of directors shall have the effect of shortening the term of any incumbent director.¹⁸⁹

Under the pending Act, the names and addresses of the first board of directors may be stated in the articles of incorporation, and if they are so stated, they shall hold office until their successors have been elected and qualified.¹⁹⁰ There is no similar provision in the present Act.¹⁹¹

The pending Act contains the identical provision¹⁹² dealing with classification of directors that is contained in the present Act.¹⁹³ The traditional objections to the classification of directors are that a majority of the board cannot be replaced at any one annual meeting and that, because of this, classification impairs the effectiveness of cumulative voting. Cumulative voting and "straight voting" are the two major methods of electing directors.¹⁹⁴ Cumulative voting is the method by which each voting shareholder is entitled to votes equal to the number of his shares multiplied by the number of directors to be elected. After his total number of votes is determined, the holder may cast all his votes for a single director or distribute them among the candidates as he sees fit. When cumulative voting is used, it enables the minority stockholders to combine their votes and elect a director. Classification of directors reduces the number of directors to be elected each year, and, thus, the minority group's ability to gain any advantage

¹⁸⁹ Acts § 31-1-21(a).

¹⁹⁰ *Id.*

¹⁹¹ W. VA. CODE ANN. § 31-1-16 (1972 Replacement Volume).

¹⁹² Acts § 31-1-21(b).

¹⁹³ W. VA. CODE ANN. § 31-1-16(d) (1972 Replacement Volume).

¹⁹⁴ Cumulative voting is mandated by the West Virginia Constitution. W. VA. CONST. art. XI, § 4.

by voting cumulatively is limited. To elect one director to a nine-man board which is not classified, a minority group needs only one more than ten percent of the votes at the meeting. However, by reducing the number of directors to be elected to just three, the number needed to elect a director is raised from ten percent plus one to twenty-five percent plus one.

In *State ex rel. Syphers v. McCune*,¹⁹⁵ the West Virginia Supreme Court of Appeals held a plan for classification of directors by a West Virginia corporation to be invalid. The bylaws of the corporation in *Syphers* provided for a board of five directors, divided into three classes. Two directors were to be elected in one year, two directors two years thereafter, and one director four years thereafter with each director to serve a six year term. As a result of this plan, the petitioners could not elect a single director although they could have done so if five directors had been elected. The court in *Syphers* held:

Regardless of the motives or purposes of the management of the corporation, or whether such bylaw provisions have proved beneficial, it is readily observable that such limitations give a majority of the stockholders the power to elect all directors of the corporation with no power in a lesser percentage of the votes to elect a single director, and thus deprives entirely the minority of representation on the board and a voice in the management of the affairs of the company. As stockholders have the right to vote cumulatively, a plan which prevents the full enjoyment of that right is, to that extent, an effectual and substantial denial of the right and illegal. Accordingly, we are of the opinion that the stockholders had the right to vote on all five positions of directors of the corporation, and they could not be limited to the selection of any lesser number.¹⁹⁶

In *Syphers* it is not clear from the opinion whether the court means that classification of directors is invalid if it gives the majority the power to elect "all directors" and "entirely deprives" the minority of any representation on the board, or whether classification would be valid if it does not "entirely deprive" the minority of "some" representation. Perhaps all the court means is that if some representation is afforded the minority, the classified directorate can coexist with cumulative voting.¹⁹⁷

¹⁹⁵ 143 W. Va. 315, 101 S.E.2d 834 (1958), *Commented on in* 64 W. VA. L. REV. 325 (1962).

¹⁹⁶ 143 W. Va. at 323, 101 S.E.2d at 838-39.

¹⁹⁷ 64 W. VA. L. REV. 325, 336 (1962).

The court, in declaring classification invalid in the *Syphers* case, made no direct reference to any other cases on the subject, nor did it expressly invalidate the present code provision dealing with classification of directors. However, Judge Browning, dissenting in *Diamond v. Parkersburg-Aetna Corp.*,¹⁹⁸ speaking of the *Syphers* case said, "This decision, of course, rendered invalid the last sentence of Code, 31-1-16."¹⁹⁹

The *Diamond* case is another situation where limited minority voting was at issue. In *Diamond*, the corporation reduced the number of directors to be elected from eight to three; one director to be elected by preferred stockholders, the remainder to be elected by holders of common stock. The minority stockholders claimed that the charter provision of the corporation that limited the stockholders power to vote for directors was invalid and in conflict with the West Virginia Constitution as amended in 1958.²⁰⁰ The effect of the 1958 amendment was to validate the provisions of existing charters that authorized the issuance of classes of stock with full, limited, or no voting powers. The amendment was attacked on the ground that its parts were in "irreconcilable conflict"; the first part of the amendment allows a corporation to issue stock with full, limited, or no voting powers while the second part relates to the cumulative manner in which persons "holding stock having the right to vote" shall exercise that right. This cumulative voting provision states that persons holding stock with the right to vote shall vote for "as many persons as there are directors or managers to be elected . . . and such directors or managers shall not be elected in any other manner."²⁰¹ The court found no irreconcilable conflict, but found the provision unclear and ambiguous and thus subject to interpretation. The court then interpreted the amendment to mean that full, limited, or no voting stock could be issued and whether one could vote for a director or cumulate his votes depended on the type of stock that one purchased. Thus a stockholder holding stock that gives him the limited right to vote for more than one director but for less than the total number of directors to be elected shall have the right to vote for that number of directors to be elected, or to cumulate his shares, while a stock-

¹⁹⁸ 146 W. Va. 543, 122 S.E.2d 436 (1961).

¹⁹⁹ *Id.* at 569, 122 S.E.2d at 450. This sentence provides for classification in the same manner as is provided in the pending Act. Acts § 31-1-21(b).

²⁰⁰ The constitutional article remained the same so far as the provision dealing with cumulative voting is concerned.

²⁰¹ W. VA. CONST. art. XI, § 4.

holder holding stock that gives him no voting power cannot vote for any directors to be elected and cannot cumulate his shares.²⁰²

The court expressly stated in *Diamond* that its holding was not contrary to the *Syphers* case:

[*Syphers*] was decided under Article XI, Section 4 of the Constitution and before the ratification of the 1958 Amendment and determined the effect of the terms of the original constitutional provision relating to cumulative voting. For that reason the *Syphers* case is distinguishable from and does not control the decision in the case at bar on the question whether stockholders holding shares of stock with limited or no voting power under the provisions of the 1958 Amendment may cumulate such shares in the election of directors or managers of the corporation.²⁰³

Since, according to *Diamond*, it is constitutional to limit the power of stockholders to vote for directors, it is foreseeable that the validity of classifying directors will be litigated again. Indeed, the legislature's re-enactment of the provisions concerning classification of directors gives a strong basis for argument that the legislature believes classification and cumulative voting can coexist.

Statutory procedures for filling vacancies on the board of directors are included in the pending Act.²⁰⁴ There are no such provisions in the present Act, nor is there West Virginia case law on this subject. The pending Act provides that vacancies on the board of directors may be filled by the affirmative vote of a majority of the remaining directors, even if the remaining directors do not constitute a quorum. This method is used unless the articles of incorporation or bylaws provide another manner. A director elected or appointed under this procedure shall serve for the unexpired term of his predecessor in office. However, any directorship that is filled because of an increase in the number of directors can be filled by the board of directors only for a term continuing until the next election of directors.

The term "quorum" is used to designate the number of directors that must be duly assembled in order for the board to be competent to transact business. Under the present Act, a majority of the directors constitutes a quorum for the transaction of business unless the bylaws provide otherwise. The number may not be

²⁰² 146 W. Va. at 556, 122 S.E.2d at 444.

²⁰³ *Id.* at 557, 122 S.E.2d at 444.

²⁰⁴ Acts § 31-1-22.

less than one-third of the total number of directors nor less than two directors; however, when the board contains only one director, naturally only he is necessary to constitute a quorum.²⁰⁵ According to the pending Act, a quorum shall be a majority of the number of directors, unless a greater number is required by the articles of incorporation or the bylaws.²⁰⁶ Thus, under the pending Act the shareholders should be given better representation, especially in the larger corporations where more diverse interests can be represented.

The pending Act provides that the act of a majority of the directors at a meeting where a quorum is present shall be the act of the board of directors.²⁰⁷ This would apply in all cases except when the action of more than a majority is required by the articles of incorporation or the bylaws. This provision is nothing more than a codification of well-settled case law. *Lawrence v. Montgomery Gas Co.*²⁰⁸ held that in West Virginia, as elsewhere, corporate action cannot be lawfully expressed or made binding by less than a quorum of the directors or stockholders acting jointly at a meeting regularly called following proper notice.

Under the new corporation Act, the articles of incorporation or the bylaws may provide for larger than majority voting requirements in order to transact business.²⁰⁹ The articles or the bylaws could even require unanimous consent before certain types of corporate action could be carried out. The present code does not expressly provide for greater voting requirements of the directors; however, this can perhaps be inferred.²¹⁰

Unlike the present Act, the pending Act expressly provides a method for the removal of directors.²¹¹ Any or all of the directors may be removed at a meeting of shareholders called expressly for the purpose of removing directors. Directors may be removed either with or without cause by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. The

²⁰⁵ W. VA. CODE ANN. § 31-1-16(b) (1972 Replacement Volume).

²⁰⁶ Acts § 31-1-23. This section is identical to section forty of the Model Business Corporation Act.

²⁰⁷ *Id.*

²⁰⁸ 88 W. Va. 352, 106 S.E. 890 (1921).

²⁰⁹ Acts § 31-1-71. This section is, in substance, the same as section 143 of the Model Business Corporation Act.

²¹⁰ W. VA. CODE ANN. §§ 31-1-6(g), -20 (1972 Replacement Volume).

²¹¹ Acts § 31-1-96. This section is the same as section thirty-nine of the Model Business Corporation Act except for a few changes in paragraph two.

right of removal hinges not on the propriety of a director's conduct but on the bare question of whether the shareholders desire to retain him as a representative on the board for whatever reason.²¹² The pending Act also provides that if less than the entire board is to be removed, no single director may be removed if the votes cast against his removal would be sufficient to elect him. This provision would have no application unless the corporation uses cumulative voting.²¹³ Additionally, when the holders of the shares of any class are entitled to elect a director, removal of that director shall be by the holders of the outstanding shares of that class and not by the outstanding shares as a whole.²¹⁴

There is also an express provision of the pending Act that deals with the removal of directors of nonprofit corporations.²¹⁵ Unlike the business corporation section, however, a director of a nonprofit corporation may be removed by any procedure provided in the articles of incorporation or the bylaws.

The corporate authority held by the board of directors may be delegated under both the present²¹⁶ and pending²¹⁷ Acts to a committee of the board of directors. Executive and other committees are treated in the pending Act much the same as they are under the present Act. The resolution to set up a committee must be adopted by a majority of the full board of directors under both the pending and current Acts. This is in contrast to most corporate business which requires only a majority of the quorum for approval.²¹⁸

The executive committee is a committee formed in order to perform the managerial functions of the corporation. Under the present Act, the executive committee must consist of two or more directors.²¹⁹ This provision has been retained in the pending Act for nonprofit corporations;²²⁰ the pending Act, however, does not specify any minimum number for the executive committee of a business corporation.²²¹ Thus, under the pending Act a single director

²¹² 1 MODEL BUS. CORP. ACT ANN. § 39, ¶ 2 (2d ed. 1971).

²¹³ See 1 MODEL BUS. CORP. ACT ANN. § 39 (2d ed. 1971).

²¹⁴ Acts § 31-1-96.

²¹⁵ Acts § 31-1-140.

²¹⁶ W. VA. CODE ANN. § 31-1-16(c) (1972 Replacement Volume).

²¹⁷ Acts § 31-1-98.

²¹⁸ See Acts § 31-1-23.

²¹⁹ W. VA. CODE ANN. § 31-1-16(c) (1972 Replacement Volume).

²²⁰ Acts § 31-1-141.

²²¹ Acts § 31-1-98.

can be made an executive committee.

Under the present Act, committees may exercise any power that the board of directors itself could exercise, limited only by the bylaws or the resolution designating such committees.²²² The pending Act, however, delineates certain powers of the board of directors that cannot be delegated to a committee.²²³ These include adopting resolutions to amend the articles of incorporation, to recommend a merger or consolidation, to recommend a voluntary dissolution, or to amend the bylaws of the corporation. It should also be noted that under the pending Act, a delegation of authority to a committee does not relieve the board of directors, or any member of the board, of any responsibility imposed by law.²²⁴ There is no similar provision in the present Act.

Both the present and pending Acts contain sections expressly dealing with the officers of a corporation. Under the present Act,²²⁵ three officers are required—a president, a secretary, and a treasurer. These officers must be chosen by the board of directors with the president being chosen from among the directors. The corporation may also have a chairman of the board, one or more vice presidents, assistant secretaries, and assistant treasurers, if the bylaws so provide. Unless the bylaws provide otherwise, these additional officers are also chosen by the board of directors. The present Act also provides that any two of these named officers, except those of president and vice president, may be held by the same person. Thus, the three officers that are required by the present Act may be held by the same person since the vice president is presently an optional officer. However, the present Act limits this practice by providing that no officer shall execute, acknowledge, or verify any instrument in more than one capacity if the instrument is required by law or by the bylaws of the corporation to be executed, acknowledged, verified, or countersigned by two or more officers.

The pending Act, for both business²²⁶ and nonprofit²²⁷ corporations, calls for the election by the board of directors of a president, one or more vice presidents as may be prescribed by the bylaws, a secretary, and a treasurer. Other officers and assistant officers and

²²² W. VA. CODE ANN. § 31-1-16(c) (1972 Replacement Volume).

²²³ Acts § 31-1-98.

²²⁴ *Id.*

²²⁵ W. VA. CODE ANN. § 31-1-18 (1972 Replacement Volume).

²²⁶ Acts § 31-1-104.

²²⁷ Acts § 31-1-142.

agents, as deemed necessary, may be elected or appointed by the board of directors or chosen in any other manner set out in the bylaws. The pending Act, unlike the present one, does not require the president to be chosen from among the directors. The pending Act, like the present one, allows two or more offices to be held by the same person. However, under the new Act, the offices of president and secretary cannot be held by the same person. Since both president and secretary are mandatory offices under the pending Act, at least two separate officers are required. This leads to the anomalous result that even though only one director is necessary,²²⁸ at least two officers are required; this can be a problem for one-man corporations, and the statute should be amended to provide for the one-man corporation contingency. Otherwise the provision should be kept intact because it does separate the bookkeeping function from the presidential function thus promoting internal security.

The pending Act details the authority of the officers in a business corporation by providing that all officers and agents of the corporation shall have the authority provided them in the bylaws or as may be provided by a resolution of the board of directors.²²⁹ There is no provision similar to this in the present Act.

The section dealing with officers of nonprofit corporations under the pending Act contains a provision allowing the articles of incorporation or the bylaws to provide that any one or more officers of the corporation shall be *ex officio* members of the board of directors.²³⁰ Thus, by being elected to one of the offices of the nonprofit corporation, the officer may also become a member of the board of directors. This provision should allow more centralized management of nonprofit corporations than is presently available.

The term of office for the officers of a nonprofit corporation differs substantially from that for officers of a business corporation under the pending Act.²³¹ In nonprofit corporations, the officers are elected or appointed for terms, not exceeding three years, as may be prescribed in the articles of incorporation or the bylaws. Absent such provision, all officers shall be elected or appointed annually by the board of directors.²³² In business corporations, no limit on

²²⁸ Acts § 31-1-21(a).

²²⁹ Acts § 31-1-104.

²³⁰ Acts § 31-1-142.

²³¹ *Id.*

²³² *Id.*

officers' terms is set, and the manner and time of election is left up to the bylaws.²³³

Provisions for removal of officers in business and nonprofit corporations are also contained in the pending Act.²³⁴ In business corporations, any officer or agent may be removed by the board of directors. In nonprofit corporations, any officer elected or appointed may be removed by the persons authorized to elect or appoint such officer.²³⁵ In both types of corporations, the test for removal is whether the best interests of the corporation will be served by such removal. It should be noted that in both business and nonprofit corporations, the removal of an officer will not prejudice any contract rights that the removed officer might have.²³⁶

Both the current²³⁷ and pending²³⁸ Acts contain provisions concerning the place and notice of directors' meetings. The pending Act provides that meetings may be held either within or without the State. The notice requirement under the pending Act for regular and special meetings of the board is different from that contained in the present Act. Under the new Act, regular meetings may be held with or without notice as prescribed in the bylaws. Special meetings shall be held upon the notice that is prescribed in the bylaws except that notice is required when the purpose of the meeting is to amend the bylaws or to authorize the sale of all the assets of the corporation. If the special meeting is called for one of these purposes, the notice must set forth the nature of the business that is intended to be transacted at the meeting.²³⁹

Both the pending²⁴⁰ and present²⁴¹ Acts provide that atten-

²³³ Acts § 31-1-104.

²³⁴ Acts §§ 31-1-104(b), -142(b).

²³⁵ Acts § 31-1-142(b).

²³⁶ "Contract rights" presumably refers to employment contracts. It should be noted that this section also provides that the election or appointment of an officer or agent shall not of itself create contract rights. *Id.*

²³⁷ W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

²³⁸ Acts § 31-1-24. This section is basically the same as section forty-three of the Model Business Corporation Act.

²³⁹ Acts § 31-1-24(b). In contrast to this, the present Act provides that regular meetings may be held at such time and place as the bylaws may prescribe, or the board may from time to time designate by resolution. Notice of meetings shall be given as required by the bylaws, and if no method is described in the bylaws, then by mailing a written notice to each director at his last known post-office address at least five days before the time of the meeting. W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume).

²⁴⁰ Acts § 31-1-24(c).

²⁴¹ W. VA. CODE ANN. § 31-1-68 (1972 Replacement Volume).

dance by a director at a board of directors' meeting shall constitute a waiver of notice. The pending Act additionally provides, however, that attendance is not a waiver if the director attends for the express purpose of objecting to the transaction of any business because the meeting is unlawfully called or convened. The pending Act also provides that notice of meetings may be waived by a writing signed by those entitled to notice or by attendance in person or by proxy.²⁴² The lone case dealing with waiver of notice in West Virginia is *Kearneysville Creamery Co. v. American Creamery Co.*;²⁴³ in that case the West Virginia court held that when all the stockholders and officers of a corporation participate without dissent in an informal directors meeting, they are estopped to deny the legality of the meeting.²⁴⁴

The directors of a corporation may take action without a meeting under both the current²⁴⁵ and pending²⁴⁶ Acts. This may be done provided consent in writing, setting forth the action taken, is signed by all of the directors or all of the members of the committee, as the case may be. This consent shall have the same effect as a unanimous vote. Similarly, another section of the pending Act²⁴⁷ provides that a vote required or permitted to be taken by the directors at a meeting may also be dispensed with if all the directors agree in writing to the corporate action being taken. Such an agreement will have the same effect and validity as though the action were taken by the unanimous action of all directors at a meeting duly called and legally held.

Oftentimes, a director's personal interest may conflict with his duty to the corporation. The pending Act²⁴⁸ substantially changes the current practice concerning these conflicts of interest. Under the present Act,²⁴⁹ no member of a board of directors may be present at a board meeting considering or voting on a matter in which he has a personal interest. As to that issue the board member can only vote as a stockholder. On the other hand, the pending Act

²⁴² Acts § 31-1-72. This section is, in part, the same as section 144 of the Model Business Corporation Act.

²⁴³ 103 W. Va. 259, 137 S.E. 217 (1927).

²⁴⁴ *Id.* at 262, 137 S.E. at 218.

²⁴⁵ W. VA. CODE ANN. §§ 31-1-16(c), -68 (1972 Replacement Volume).

²⁴⁶ Acts § 31-1-25. This section is identical to section forty-four of the Model Business Corporation Act.

²⁴⁷ Acts § 31-1-73.

²⁴⁸ Acts § 31-1-97(a). This provision is identical to section forty-one (a) of the Model Business Corporation Act.

²⁴⁹ W. VA. CODE ANN. § 31-1-69 (1972 Replacement Volume).

provides that a contract or transaction in which a director has a personal interest will not be void or voidable even though the interested director was present at the meeting and had his vote counted provided one of three conditions is met:

- (1) The fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors; or
- (2) The fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or
- (3) The contract or transaction is fair and reasonable to the corporation.²⁵⁰

The first two of these conditions seems easy to apply and appear to be desirable. These conditions will enable those not interested personally in the contract or transaction to determine for themselves whether the transaction is indeed best for the corporation. The third condition seems difficult to interpret; the concept of what is fair and reasonable in a given instance will be difficult to ascertain.

The pending Act provides that an interested director may be counted for the purpose of determining whether a quorum is present for the board meeting.²⁵¹ This does not change the present procedure because the Code²⁵² now provides that if an interested director's retirement from the meeting reduces the number present below a quorum, the matter can still be decided by those uninterested directors who remain.²⁵³

Strangely enough, the pending Act has no conflicts of interest

²⁵⁰ Acts § 31-1-97(a).

²⁵¹ Acts § 31-1-97(b).

²⁵² W. VA. CODE ANN. § 31-1-70 (1972 Replacement Volume).

²⁵³ In *Thurmond v. Paragon Colliery Co.*, 82 W. Va. 49, 95 S.E. 816 (1918), the West Virginia court held that the reason for denying to a director of a corporation the right to vote on a matter in which he is interested other than as a shareholder is because of the fiduciary or trust relation he bears toward it. *Id.* at 53, 95 S.E. at 817. *Campbell v. Hutchinson Lumber Co.*, 106 W. Va. 142, 145 S.E. 160 (1928), held that even though dealings of directors with the corporation are viewed with jealousy where the dealings affect the right of others and the presumption is that they are fraudulent, this presumption is not conclusive, and it may be rebutted by clear and convincing evidence to the contrary. *Id.* at 150, 145 S.E. at 163. The pending Act does away with this presumption.

section for nonprofit corporations. This omission should be corrected by the legislature before the pending Act becomes effective.

The directors of a corporation are bound to perform their managerial duties properly. If the directors exceed their authority, they will, in certain cases, become liable to the corporation. The present law²⁵⁴ and the pending Act²⁵⁵ set forth certain situations that will make the directors liable. The current Act provides liability only if the board declares and pays a dividend when the corporation is insolvent or when the payment of a dividend renders it insolvent or diminishes the amount of capital. The pending Act lists, in addition to any other liability imposed by law upon directors, three specific instances when the directors will be jointly and severally liable: (1) directors who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders when the distribution is made in violation of the provisions of this Act or contrary to any restrictions contained in the articles of incorporation; (2) directors who vote for or assent to the purchase of its own shares contrary to the provisions of this Act; and (3) directors who vote for or assent to the distribution of assets to the shareholders during the liquidation of the corporation without the payment and discharge of, or without making adequate provisions for, all known debts, obligations, and liabilities of the corporation. In each case, the directors will be jointly and severally liable for the excess over what could have been legally distributed.

Under present procedure, any director who dissents from this action and who causes his dissent to be entered on the record of the proceedings shall not incur any liability.²⁵⁶ The pending Act establishes a presumption that a director of a corporation who is present at these meetings has assented to the action taken.²⁵⁷ As in the present Act, this presumption is rebutted if his dissent is entered in the minutes of the meeting or if he files his written dissent to such action with the secretary of the meeting before adjournment or if he forwards this dissent by registered mail to the secretary of the corporation immediately following the adjournment of the meetings. This right to dissent, however, shall not apply to a director who voted in favor of the action.²⁵⁸ Under

²⁵⁴ W. VA. CODE ANN. § 31-1-78 (1972 Replacement Volume).

²⁵⁵ Acts § 31-1-102. This section is identical to section forty-eight of the Model Business Corporation Act.

²⁵⁶ W. VA. CODE ANN. § 31-1-78 (1972 Replacement Volume).

²⁵⁷ Acts § 31-1-102.

²⁵⁸ *Id.*

both the present²⁵⁹ and pending Acts,²⁶⁰ a director is free from liability if he relies and acts in good faith on the financial statements of the corporation.²⁶¹

Other provisions in the pending Act entitle the director to contribution from the shareholders and other directors for a claim asserted against him.²⁶² Under the present Act, the director is entitled to contribution from the shareholders,²⁶³ but there is no provision calling for contribution from the other directors. Unlike the present Act, the pending Act allows contribution from shareholders only when the shareholder who has accepted or received a dividend or asset knows the distribution has been made in violation of this Act.²⁶⁴

One of the most significant sections in the pending Act is that section dealing with the indemnification of officers, directors, employees, and agents.²⁶⁵ Indemnification is available under the present corporation Act,²⁶⁶ but not nearly to the extent or in the detail provided under the pending Act. Since the turn of the century, the subject of indemnification by a corporation has been one of increasing importance.²⁶⁷ In carrying out corporate duties, directors, officers, and employees may be subject to personal attacks stemming from these official acts, and as a direct result may incur expenses in defense of these claims and may suffer penalties if the claims are found to be valid.

The current Act provides for indemnification of directors or officers, former directors or officers, and any person who may have acted as a director or officer of another corporation in which his

²⁵⁹ W. VA. CODE ANN. § 31-1-16(e) (1972 Replacement Volume).

²⁶⁰ Acts § 31-1-102.

²⁶¹ Acts § 31-1-102 reads in part:

A director shall not be liable . . . if he relied . . . upon financial statements . . . represented to him to be correct by the president or other officers of such corporation having charge of its books of account, or stated in a written report by an independent public accountant or firm of such accountants fairly to reflect the financial condition of such corporation

²⁶² Acts § 31-1-102.

²⁶³ W. VA. CODE ANN. § 31-1-78 (1972 Replacement Volume).

²⁶⁴ Acts § 31-1-102.

²⁶⁵ See generally H. HENN, *LAW OF CORPORATIONS* § 379, at 800 (2d ed. 1970); Bishop, *Indemnification of Corporate Directors, Officers, and Employees*, 20 BUS. LAW. 833 (1965); Note, *Indemnifying the Corporate Director for Litigation Expenses*, 28 U. PITT. L. REV. 114 (1966).

²⁶⁶ W. VA. CODE ANN. § 31-1-18a (1972 Replacement Volume).

²⁶⁷ 1 MODEL BUS. CORP. ACT ANN. § 5, ¶ 2 (2d ed. 1971).

corporation owns shares of capital stock or of which it is a creditor. In order to be indemnified by the corporation, the expenses must be "actually and necessarily incurred" as part of the defense of either civil or criminal proceedings. Directors or officers are not entitled to indemnification if they are adjudged in the proceeding to be liable for negligence or misconduct in the performance of their duties to the corporation. The current Act, however, allows further indemnification to be authorized by the articles of incorporation, the bylaws, or resolutions adopted by the shareholders following proper notice.²⁶⁸

The pending Act divides the type of action for which indemnification is proper into actions against the corporation or its different members and action by or in the right of the corporation by the members of the corporation.²⁶⁹ More simply stated, the former deals with third party suits and the latter with derivative actions. In either case, indemnification extends to a person who is a party or is threatened to be made a party to litigation by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another entity.

In third party actions, the scope of indemnification includes expenses (including attorneys' fees), judgments, fines, taxes, and amounts paid in settlement actually and reasonably incurred in connection with the action. The test of conduct that must be met before indemnification is proper is specifically provided in the pending Act. Officers, directors, employees, or agents must have "acted in good faith and in a manner [they] reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe their conduct was unlawful."²⁷⁰ The pending Act also provides in regard to third party suits that the termination of any action or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere, or its equivalent, shall not, of itself, mean that the person acting for the corporation did not meet this test of conduct.²⁷¹

The same persons entitled to indemnification with respect to third party suits are entitled also to indemnification under the

²⁶⁸ W. VA. CODE ANN. § 31-1-18a (1972 Replacement Volume).

²⁶⁹ Acts §§ 31-1-9(a), (b).

²⁷⁰ Acts § 31-1-9(a).

²⁷¹ *Id.*

derivative action provisions.²⁷² Indemnification in derivative suits extends only to "expenses (including attorneys' fees) actually and reasonably incurred . . . in connection with the defense or settlement of such action or suit."²⁷³ Conduct in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation is also the standard of conduct required for indemnification in derivative suits. However, there is one important exception. Indemnification is not permitted where the person has been "adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation" ²⁷⁴

The pending Act provides specific methods for determining whether the director, officer, employee, or agent has met the applicable standard of conduct that will allow indemnification.²⁷⁵ Unless the indemnification is ordered by a court, the determination shall be made: (1) by the board of directors with a majority vote of a quorum consisting of those who were not parties to such action or proceeding; (2) if such a quorum is not obtainable, or if a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or (3) by the shareholders or members.

The pending Act also allows payment of expenses in advance of a final decision if authorized pursuant to one of the methods set forth above.²⁷⁶ These advance payments are limited to cases where the corporation receives by the person so indemnified a guarantee to repay these advance payments unless it is later determined that he is entitled to indemnification.

The indemnification provided in this section of the pending Act is not deemed to be exclusive.²⁷⁷ There may also be other rights under bylaws, agreements, vote of shareholders, members, or disinterested directors, or otherwise, both as to actions in his official capacity and as to actions in another capacity while holding his office. This subsection also provides that the indemnification shall continue for a person who has ceased to be a director, officer, employee, or agent, and it shall inure to the benefit of the heirs, executors, and administrators of such person.²⁷⁸

²⁷² Acts § 31-1-9(b).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Acts § 31-1-9(d).

²⁷⁶ Acts § 31-1-9(e).

²⁷⁷ Acts § 31-1-9(f).

²⁷⁸ *Id.*

Corporations are given the power to purchase and maintain liability insurance for its members or its members serving with another enterprise by the pending Act. This insurance is to cover liability asserted against him and incurred by him in any capacity arising from his status as a corporate member. Also the insurance applies regardless of whether the corporation would have the power to indemnify him against such liability under the provisions of this section.²⁷⁹ The present Act contains no such provision for liability insurance.²⁸⁰

D. Stock and Capital

1. *Business Corporations*

a. Authorization and Issuance of Shares

The pending Act grants each business corporation the power to create and issue the number of shares of stock stated in its articles of incorporation.²⁸¹ The corporate shares may be divided into one or more classes, may be with or without par value, and may be subject to any designations, preferences, limitations, and relative rights so stated in the articles. The articles may limit, deny, or provide special voting rights for shares to an extent not inconsistent with the provisions of the pending Act.²⁸² Basically, these same provisions were contained in the Code prior to amendment; therefore, little change is contemplated as a result of this portion of the pending Act. The present West Virginia corporation law granted to every corporation except banking institutions the power "to issue one or more classes of stock."²⁸³ The new Act, by not including the aforementioned exception, authorizes even banking institutions to issue one or more classes of stock. The current Act also provides that all corporations except banking institutions, indemnity, insurance and industrial loan companies, or building and loan associations may issue shares of no-par value.²⁸⁴ The pending Act does away with these exceptions and permits any

²⁷⁹ Acts § 31-1-9(g).

²⁸⁰ See generally Mace, *Directors' and Officers' Liability Insurance*, 85 BANKING L. J. 39 (1968).

²⁸¹ Acts § 31-1-78. This section is identical to section fifteen of the Model Business Corporation Act. The counterparts of this section in the current code are W. VA. CODE ANN. §§ 31-1-11, -13, -22, -23 (1972 Replacement Volume).

²⁸² Acts § 31-1-78.

²⁸³ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume).

²⁸⁴ *Id.* § 31-1-23.

corporation organized for profit to issue no-par stock.²⁸⁵

Under the auspices of the current Act, shares can have full or limited voting powers or can be without voting powers altogether and can be subject to any "designation, preferences, and relative, participating, optional or other special rights and qualifications, limitations or restrictions thereof" as were stated in the charter, amendments thereto, or resolutions adopted by the board of directors pursuant to authority vested in it by the charter.²⁸⁶ By stating that the shares may be subject to any "designations, preferences, limitations, and relative rights" stated in the articles, the pending Act has reduced the verbiage of this part of the Code without changing the substantive law.

Both the current and pending Acts authorize corporations to issue preferred or special stock²⁸⁷ and provide for the right of the corporation to redeem the shares of preferred stock at a price fixed by the articles.²⁸⁸ The pending Act provides that dividends on preferred stock may be cumulative, partially cumulative, or non-cumulative; whereas, the present Act provides for only cumulative or non-cumulative dividends.²⁸⁹

The new Act provides that the shares of preferred stock may have preference over any other classes of stock as to the payment of dividends and the sharing in the assets of the corporation upon the voluntary or involuntary liquidation of the corporation if so provided in the articles of incorporation.²⁹⁰ This language is substantially the same as that used in the current Act and will not result in any substantive changes in the law involving stock having preferences as to dividends or shares.

Both the current and pending Acts provide that a corporation may issue shares of preferred stock that are convertible into shares of any other class, shares of any series of the same class, or shares of any series of any other class.²⁹¹ However, the new Act adds two provisions not contained in the present Act. The first of these provisions prohibits upstream transfers, that is, the exchange of shares of one class for shares of a class having prior or superior

²⁸⁵ Acts § 31-1-78.

²⁸⁶ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume).

²⁸⁷ Hereinafter referred to only as preferred stock.

²⁸⁸ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume); Acts § 31-1-78.

²⁸⁹ Acts § 31-1-78.

²⁹⁰ *Id.*

²⁹¹ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume); Acts § 31-1-78.

rights and preferences as to dividends or distribution of assets upon liquidation. The second new provision states that shares without par value cannot be converted into shares with par value unless the part of the stated capital represented by the shares without par value is "at the time of conversion, at least equal to the aggregate par value of the shares into which the shares without par value are to be converted or the amount of any such deficiency is transferred from surplus to stated capital"²⁹² This provision merely codifies the mechanism that accountants have used to accomplish this transaction without the benefit of legislative mandate.

The pending Act allows the board of directors, when authorized by the articles, to fix the terms of a series of preferred or special shares so as to meet current business exigencies.²⁹³ It accomplishes this result without the necessity of holding shareholders' meetings to amend the articles, thereby providing for more corporate flexibility and prompter action.

The pending Act is considerably more restrictive than the current code in terms of the rights and preferences which may vary between series. The new Act provides that all shares of the same class must be identical in all aspects except the following, which may vary: (1) the rate of dividend; (2) whether shares may be redeemed and, if so, the redemption price and the terms and conditions of redemption; (3) the amount payable upon shares in the event of voluntary or involuntary liquidation; (4) sinking fund provisions, if any, for the redemption or purchase of shares; (5) the terms and conditions, if any, on which shares may be converted; and (6) voting rights, if any.²⁹⁴

The present Act, rather than state that shares of the same class must be identical, subject to certain exceptions, specifically states those rights and preferences that may vary between series with a broad catch-all provision that allows shares in a series to have such relative rights and preferences as were stated by the articles of incorporation or the board of directors. The present Act specifically authorizes variances from the same rights and preferences as does the pending Act, except that there is no specific

²⁹² Acts § 31-1-78.

²⁹³ Acts § 31-1-79. This section is substantially identical to section sixteen of the Model Business Corporation Act. The comparable statutory provision in the current code is W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume).

²⁹⁴ Acts § 31-1-79.

provision permitting a variation between series as to sinking fund provisions for the redemption or purchase of shares. However, sinking fund provisions are permitted to vary under the present Act by virtue of the catch-all provision.²⁹⁵

The two major changes that will occur as a result of these provisions are that the cumulative status of dividends will no longer be permitted to vary between series, and the broad provision in the current Act permitting shares in a series to have such relative rights and preferences as stated by the charter or the board of directors will no longer exist.²⁹⁶

The new Act permits the articles of incorporation to grant authority to the board of directors to adopt resolutions dividing classes of shares into series and fixing and determining the relative rights and preferences of the shares of any series within the limitations imposed by statute or by the articles.²⁹⁷ This provision will not change the law as it exists prior to the effective date of the pending Act. The granting of power to the board of directors to vary the terms of shares of stock to be issued in different series has been criticized because it gives power to the board to dilute the interest of existing shareholders. However, the advantages of flexibility are thought to outweigh the possibility of harmful dilution, and there are no valid reasons for denying this flexibility when the shareholders are willing to grant it.²⁹⁸

The specific method for filing and recording the resolution setting forth relative rights and preferences of shares within a series remains unchanged by the pending Act.²⁹⁹ The resolution must still be filed in the office of the Secretary of State and recorded in the office of the clerk of the appropriate county. However, the contents and manner of execution of the resolution have been somewhat modified by this provision. The statement adopting the resolution is required to contain only: (1) the name of the corporation; (2) a copy of the resolution establishing and designating the series and fixing and determining the relative rights and preferences thereof; (3) the date and adoption of such resolution; and (4) that such resolution was duly adopted by the board of directors.³⁰⁰

²⁹⁵ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume).

²⁹⁶ Acts § 31-1-79.

²⁹⁷ *Id.*

²⁹⁸ 1 MODEL BUS. CORP. ACT ANN. § 16, ¶ 2 (2d ed. 1971).

²⁹⁹ Acts § 31-1-79.

³⁰⁰ *Id.*

The present Act provides that a certificate must set forth a copy of the resolution and the number of shares of stock of the class or series;³⁰¹ it does not specifically require that the certificate state the name of the corporation, the date of adoption, or the fact that the resolution was duly adopted. However, sound business practice, as a practical matter, would require the inclusion of these minimal facts in such a statement. Although the new Act does not mention the present requirement of setting forth the number of shares of stock of a class or series, this requirement would likely have to be complied with in order to fully satisfy the requirement under the pending Act that a copy of the resolution establishing and designating the series must be set forth in the statement. Such a statement must be executed in duplicate under the pending, but not the present, Act and signed by the president and secretary or assistant secretary under both Acts. The new Act adds the additional requirement that the statement must be verified by an officer signing the statement and deletes the current requirement that the statement must be acknowledged before an officer authorized by law to acknowledge deeds.³⁰²

Although the sale of stock through subscriptions is no longer commonplace, the pending Act sets out the procedure by which stock can be sold through subscriptions. These provisions are an attempt to codify the best of numerous court decisions arising from disputes over subscriptions; however, they will not have a significant impact on existing West Virginia corporate law.³⁰³

The pending Act provides that a subscription for original stock shall be irrevocable for six months unless all subscribers consent to the revocation or unless otherwise provided by the subscription agreement.³⁰⁴ The present Act does not contain a similar provision, and there is no West Virginia case law concerning irrevocability of subscription agreements for shares; however, in the absence of statutory provisions to the contrary, a subscription is revocable by virtue of case law in most states.³⁰⁵

Under the pending Act, the subscription price for the shares may be paid in full or in installments with the date of the payment

³⁰¹ W. VA. CODE ANN. § 31-1-22 (1972 Replacement Volume).

³⁰² Acts § 31-1-79.

³⁰³ Acts § 31-1-80. This section is identical to section seventeen of the Model Business Corporation Act.

³⁰⁴ Acts § 31-1-80.

³⁰⁵ 1 MODEL BUS. CORP. ACT ANN. § 17, ¶ 2 (2d ed. 1971).

or payments to be determined by the board of directors. The subscription agreement can provide for different methods and timing of payments.³⁰⁶ The current Act contains substantially the same provision, stating that the board of directors may demand payment for the subscriptions at such times and in such payments and installments as they deem proper or as specified in the subscription agreement.³⁰⁷ The current code provides that thirty days notice must be given the subscriber, either personally or by mail;³⁰⁸ whereas, the pending code provides for only twenty days notice after written demand is made.³⁰⁹ Many jurisdictions explicitly authorize notice to be given personally, by mail, or by publication, but neither West Virginia's current nor pending Act refers to notice by publication. It is also interesting to note that under the current Act, a subscriber can waive notice by executing a written instrument to such effect;³¹⁰ the pending Act does not contain a waiver provision.³¹¹ The pending code, unlike the current one, requires that calls for payment on subscriptions be uniform for shares of the same class or series.³¹²

In the event of default on a subscription payment, the present Act provides that a corporation can collect the amount due on any installment by an action at law or the shares may be sold at a public auction. Notice of the time and place of sale is required to be given by publication in a Class II legal advertisement in a newspaper in the county where the principal office of the corporation is located. Only a sufficient number of shares to cover the amount due plus interest and expenses of the sale can be sold. If the amount due on the shares is not bid in, or an action at law is not pursued, or a judgment is not satisfied, the shares are subject to forfeiture.³¹³ The pending Act provides that in case of default in payment for subscriptions, the corporation may collect the amount due in the same manner as any debt due the corporation. The bylaws may prescribe other penalties in event of default, but twenty days written notice must be given the subscriber before a forfeiture of the subscription or the amount paid thereon is de-

³⁰⁶ Acts § 31-1-80.

³⁰⁷ W. VA. CODE ANN. § 31-1-33 (1972 Replacement Volume).

³⁰⁸ *Id.*

³⁰⁹ Acts § 31-1-80.

³¹⁰ W. VA. CODE ANN. § 31-1-33 (1972 Replacement Volume).

³¹¹ Acts § 31-1-80.

³¹² *Id.*

³¹³ W. VA. CODE ANN. § 31-1-34 (1972 Replacement Volume).

clared. Written demand is made when deposited in the United States mail in a sealed envelope, postage prepaid, containing the subscriber's last known address. The language of the pending Act thereby prohibits the forfeiture of the stock or partial payment of the purchase price unless the bylaws so authorize and notice is given. It should also be noted that a sale of the stock prior to obtaining judgment on the amount due is no longer authorized.³¹⁴

All states have some statutory provision governing consideration requirements for the issuance of shares. These are usually stated in both qualitative and quantitative terms. The pending Act follows this general rule. Qualitatively, lawful consideration for shares may be cash, property, and labor or services actually performed for the corporation.³¹⁵ The quantitative restrictions are that consideration for par value shares may not be less than the par value thereof and that consideration for no-par value shares may be fixed by the board of directors unless the articles of incorporation reserve this right to the shareholders.³¹⁶

The pending Act provides that the consideration must be expressed in dollars,³¹⁷ since property has also become an acceptable substitute for currency as consideration. The board of directors has the authority to determine the amount received for no-par shares unless the articles of incorporation reserve this right to the shareholders, in which case they may establish the consideration to be received for the shares by majority vote of those entitled to vote on such a matter.³¹⁸ The present Act also prescribes the consideration to be received for par and no-par shares. It authorizes the board of directors to issue par value shares for money at not less than the par value of the shares themselves or the par value of shares into which they are convertible, whichever is greater. Also, securities convertible into shares of stock with par value cannot be issued at less than the par value of the shares into which they are convertible.³¹⁹ It is interesting to note that the pending Act does not adopt the language of the current Act concerning stock or securities convertible into par and no-par stock. Rather than defining the

³¹⁴ Acts § 31-1-80.

³¹⁵ Acts § 31-1-82.

³¹⁶ Acts § 31-1-81.

³¹⁷ Acts § 31-1-81. This section is identical to section eighteen of the Model Business Corporation Act. This section in the pending Act corresponds with W. VA. CODE ANN. §§ 31-1-25 to -30 (1972 Replacement Volume).

³¹⁸ Acts § 31-1-81.

³¹⁹ W. VA. CODE ANN. § 31-1-25 (1972 Replacement Volume).

consideration received as not less than the par value of the shares of convertible stock or the aggregate par value of shares of stock into which they are convertible, whichever is greater, the pending Act simply states that the consideration for par value shares shall be determined by the board of directors but shall not be less than the par value thereof. It then defines the amount of consideration received when the conversion privilege is exercised and shares of stock are exchanged for or converted into other shares of stock.³²⁰ The present Act provides one exception for the minimum amount of consideration to be received for par value shares; a resolution adopted by three-fourths of the shareholders can authorize the issuance below par and fix the price of both stock and securities convertible into stock.³²¹ The present Act authorizes the board of directors to issue no-par stock and securities convertible into no-par stock for such consideration as it deems appropriate, subject to restrictions in the charter or bylaws.³²² West Virginia's current Act, like that of most states, places no upper limit upon the amount of consideration to be received upon issuance of no-par shares or securities convertible into no-par shares. The current Act provides that the amount of consideration to be received for no-par shares can also be determined by a resolution adopted by the shareholders unless provided otherwise in the charter.³²³

Under the pending Act, the board of directors may fix the consideration to be received for the treasury shares.³²⁴ Generally, treasury shares are shares that are authorized and issued but not outstanding. The new Act specifically defines treasury shares as those that have been issued and are subsequently reacquired by the corporation but not cancelled or restored to the status of authorized but unissued shares.³²⁵ Treasury shares can be reacquired by a corporation by donation, forfeiture, purchase, redemption, and conversion. The present Act contains no provision regarding the amount of consideration to be received by the corporation for treasury stock; likewise there is no West Virginia case law on this subject. Thus, the portion of the pending Act relating to the consideration for the disposition of treasury shares³²⁶ will fill the gap

³²⁰ Acts § 31-1-81.

³²¹ W. VA. CODE ANN. § 31-1-29 (1972 Replacement Volume).

³²² *Id.* § 31-1-27.

³²³ *Id.* § 31-1-29.

³²⁴ Acts § 31-1-81.

³²⁵ Acts § 31-1-6(t).

³²⁶ Acts § 31-1-81.

left in this jurisdiction by virtue of the absence of statutory and case law on the subject.

When a corporation issues a share dividend, the amount of surplus which is transferred to stated capital is deemed the consideration for the issuance of the shares.³²⁷ This portion of the pending Act represents no departure from the law as it exists under the present Act.

The amount of consideration received when shares are exchanged or issued for other shares or converted into other shares is the stated capital represented by the shares so exchanged or converted plus the amount of surplus transferred to stated capital and any additional consideration paid the corporation.³²⁸ Although the current Act contains no specific statutory provision regarding the consideration received for shares issued in conversion of indebtedness as well as other shares and no case law exists in this state defining consideration under these circumstances, the approach taken by the pending code will mark no drastic departure from reasonable expectations based upon sound accounting and legal principles.

The present Act authorizes the consideration for shares to be paid in whole or in part in money, property, and labor done for the corporation. It also permits the lease or use of property as consideration for shares.³²⁹ The pending Act provides substantially the same provisions as to what consideration is acceptable as payment for shares.³³⁰ It authorizes tangible and intangible property as consideration for shares whereas the present code authorizes real and personal property. Since the two categories of property are mutually inclusive, this change in language should not result in any change in the law. Both the current and pending Acts provide that fully paid shares shall be non-assessable.³³¹ The pending Act does not allow a share certificate to be issued for partially paid shares, and although it prohibits the issuance of a share certificate for any share until the share is fully paid, installment subscriptions are expressly authorized.³³²

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ W. VA. CODE ANN. § 31-1-28 (1972 Replacement Volume).

³³⁰ Acts § 31-1-82. This section is identical to section nineteen of the Model Business Corporation Act except that the pending code uses the word "cash" rather than "money" in the first sentence of the section.

³³¹ W. VA. CODE ANN. § 31-1-28 (1972 Replacement Volume); Acts § 31-1-82.

³³² Acts § 31-1-82.

The pending Act expressly prohibits the acceptance of promissory notes and future services as consideration for the issuance of shares. This prohibition, however, applies only to payment upon original issuance of shares and not to subsequent sales of shares.³³³ Although numerous states have similar statutory provisions, West Virginia was not among this group prior to the enactment of the pending Act.³³⁴ However, by authorizing the issuance of shares for "labor done," the present Act at least impliedly prohibits the acceptance of future services as payment for the issuance of shares.³³⁵ Unlike the pending Act, the present Act contains no express provision prohibiting the use of promissory notes as payment for the issuance of shares, and no West Virginia case law exists concerning this matter.

Both the current and pending Acts provide that, in the absence of fraud, the judgment of the board of directors as to the value of the consideration received for shares shall be conclusive. The essence of accounting principles demands that all property received by a corporation as consideration for the issuance of shares must be converted into a dollar valuation for balance sheet purposes. The valuation of property and services is especially important in order to protect potential creditors of the corporation and also to protect the investment of existing shareholders against dilution caused by overvalued consideration paid in by new shareholders.

In a case decided prior to the adoption of the 1931 code, which was West Virginia's first statutory provision authorizing the issuance of stock and securities for consideration other than cash, the West Virginia Supreme Court of Appeals held that where the charter authorizes shares to be paid in property and the shareholders honestly and in good faith exchange property rather than money as payment for their subscriptions, third parties have no ground for complaint.³³⁶ Thus, when fully paid shares are issued for property received, there must be actual fraud in the transaction to entitle corporate creditors to demand an accounting by the stockholders. The 1931 code provision was merely a codification of the existing law as to the determination of value of property received for shares, and the pending Act is substantially the same.

³³³ *Id.*

³³⁴ See 1 MODEL BUS. CORP. ACT ANN. § 19, ¶ 3.03 (2d ed. 1971).

³³⁵ W. VA. CODE ANN. § 31-1-28 (1972 Replacement Volume).

³³⁶ *Fayette Wholesale Grocery Co. v. Brown Bros.*, 102 W. Va. 181, 135 S.E. 235 (1926).

Shares issued for full, lawful consideration that has been received by the corporation are deemed fully paid and nonassessable.³³⁷ Whereas some statutes permit corporations to issue certificates for partly-paid shares, subject to calls or assessments until full lawful consideration has been paid, West Virginia's new Act does not,³³⁸ although it does expressly authorize installment subscriptions.³³⁹

Four primary theories have evolved as a result of judicial decisions involving liability imposed upon shareholders of shares for which the full, lawful consideration has not been received by the corporation: (a) trust fund theory; (b) holding out theory; (c) implied promise theory; and (d) contract theory.³⁴⁰ Under the trust fund theory, the corporate assets, including unpaid consideration for shares, constitute a trust res for the benefit of creditors. If the corporation becomes insolvent, the creditors can pursue their equitable interests in the trust res into the hands of the subscriber. Under the holding out theory, subsequent creditors without knowledge that the shares were not fully paid and who rely upon the representation of the amount of stated capital paid in or due and are thereby deceived to their detriment may recover from the subscriber the unpaid consideration. The implied promise theory makes a corporation's agreement to issue fully paid and nonassessable shares for inadequate consideration an *ultra vires* act, and the acceptance of such shares by the subscriber creates an implied promise in equity to pay for them in full. The contract theory, to be distinguished from the three aforementioned theories, recognizes the validity of the contract between the corporation and the subscriber whereby the corporation agrees to issue the shares as fully paid and nonassessable for inadequate consideration. Thus, under this latter theory, in the absence of supplemental liability imposed by statute or liability for actual deception, the subscriber is not liable beyond the terms and conditions of the subscription agreement.

In the absence of statute, courts have differed as to whether the cause of action concerning the liabilities of the shareholders for unpaid consideration for shares issued or to be issued may be asserted by a creditor directly, by the corporation itself or its re-

³³⁷ Acts § 31-1-82.

³³⁸ Acts § 31-1-87.

³³⁹ Acts § 31-1-80.

³⁴⁰ H. HENN, *LAW OF CORPORATIONS* § 171, at 315 (2d ed. 1970).

ceiver, or by a creditor on behalf of the corporation. West Virginia's pending Act is silent regarding this subject, leaving this question to be answered by the judiciary.

Both the present and pending codes impose liability for the amount unpaid on the subscription upon the holder of or subscriber to shares. The current West Virginia corporation laws, like the pending Act, provides that persons holding shares in a fiduciary or representative capacity or as collateral shall not be personally liable for unpaid consideration. However, it does provide that the estate or funds held by such persons are subject to liability. The current Act protects only those fiduciaries or pledgees whose names are listed on the corporation's books as holding the shares in such capacities.³⁴¹ Unlike the pending Act, West Virginia's current Act makes shareholders expressly liable for unlawful distributions and withdrawals of capital, irrespective of any unpaid amounts due on shares.³⁴²

The current Act also contains two other mandates not present in the pending code. The first of these is that compliance with statutory provisions on reduction of capital does not release any shareholder whose shares have not been fully paid from liability for the debts of the corporation theretofore contracted.³⁴³ The current Act also provides that, in the event of corporate insolvency, all liabilities for unpaid shareholder subscriptions shall be considered assets and may be enforced by the individual winding up the affairs of the corporation, notwithstanding any release agreements short of actual payment which may have been made between the corporation and such stockholder.³⁴⁴ There is no West Virginia case law concerning either of these two provisions. Although neither is carried forward to the pending Act, the same result will likely be reached by the judiciary upon a factual situation warranting the application of the substantive law contained in these two provisions. However, it would have been preferable had the Legislature expressly provided for these situations under the pending Act.

A share certificate is an instrument which evidences the shareholder's ownership interest in a corporation. However, an individual's status as a shareholder is not dependent upon the issuance of a share certificate. The certificate primarily serves to identify

³⁴¹ W. VA. CODE ANN. §§ 31-1-35, -36 (1972 Replacement Volume).

³⁴² *Id.* § 31-1-78.

³⁴³ *Id.* § 31-1-14.

³⁴⁴ *Id.* § 31-1-35.

the shareholder and to facilitate the transfer of his interest in the corporation.

The pending Act requires the issuance of share certificates to shareholders and regulates the form and content of the certificate.³⁴⁵ It basically requires only a statement of the fundamental information necessary to identify the corporation, the shareholder, and the shares. However, additional information, such as a transfer form, a number identifying the owner, or abbreviations to indicate the nature of ownership may also appear, either on the face or the reverse of the certificate, in order to comply with custom or stock exchange requirements. For example, in order to safeguard against fraudulent duplication of publicly owned securities, the New York Stock Exchange has adopted minimum standards with respect to the form of certificates of listed securities.³⁴⁶

The Uniform Commercial Code governs the transfer of shares. It requires any transfer restrictions imposed by the issuer to be conspicuously noted on the certificate evidencing the security. Failure to comply with this provision renders the restriction ineffective except against a person with actual knowledge of the restrictions.³⁴⁷

The pending Act provides that the share certificate shall be signed by the president or a vice president and the secretary or an assistant secretary of the corporation and may be sealed with the seal of the corporation or a facsimile thereof.³⁴⁸ The current Act requires the president or vice president and the treasurer or assistant treasurer or the secretary or an assistant secretary to sign the certificate.³⁴⁹ The pending Act permits the signatures to be facsimiles if the certificate is manually signed on behalf of a transfer agent or a registrar other than the corporation itself or an employee of the corporation.³⁵⁰ The current Act contains a substantially identical provision in that it permits facsimile signatures of officers so long as the certificates are countersigned by a transfer or assistant transfer agent or by a transfer clerk acting on behalf of the corporation and the registrar.³⁵¹ Both the present and pending Acts permit

³⁴⁵ Acts § 31-1-87. This section is identical to section twenty-three of the Model Business Corporation Act.

³⁴⁶ H. HENN, *LAW OF CORPORATIONS* § 134, at 228 (2d ed. 1970).

³⁴⁷ West Virginia has codified this in W. VA. CODE ANN. § 46-8-204 (1966).

³⁴⁸ Acts § 31-1-87.

³⁴⁹ W. VA. CODE ANN. § 31-1-37 (1972 Replacement Volume).

³⁵⁰ Acts § 31-1-87.

³⁵¹ W. VA. CODE ANN. § 31-1-37 (1972 Replacement Volume).

certificates to be issued after any officers who may have signed them are no longer in office. These certificates have the same effect as if the officers who signed them were in the offices held at the time of signing.³⁵²

The pending Act standardizes the form of the stock certificate except when more than one class or series of stock is authorized. If more than one class or series of stock is authorized, the share certificate must either state the designations, preferences, limitations, and relative rights of the shares of all classes that the corporation is authorized to issue or, in lieu of setting forth these detailed provisions on the face or back of the certificate itself, that these provisions may be obtained without charge upon request to the corporation.³⁵³ West Virginia's present Act also requires that the preferences, limitations, and relative rights of shares be set forth on the share certificate. However, it does not contain the option provision found in the pending Act that permits the share certificate to substitute a statement that these relative rights and preferences will be furnished free of charge upon request.³⁵⁴

In addition to the aforementioned information, the pending Act requires that each share certificate state upon its face: (1) that the corporation is organized under the laws of this State; (2) the name of the person to whom issued; (3) the number and class of shares, and the designation of the series, if any, which such certificate represents; and (4) the par value of each share represented by such certificate, or a statement that the shares are without par value.³⁵⁵

The current Act contains no express provision with requirements substantially identical to those set forth above, although, as a practical matter, this information would need to be included on the share certificate to give it meaning and significance. The present Act does require the certificate to certify the number of shares owned by the shareholder in the corporation and to set forth the designations, preferences, and relative, participating, optional, or other special rights of each class or series of stock and the qualifications, limitations, or restrictions of these preferences and rights on the face or back of the certificate.³⁵⁶ Both the current and pending

³⁵² *Id.*; Acts § 31-1-87.

³⁵³ Acts § 31-1-87.

³⁵⁴ W. VA. CODE ANN. § 31-1-37 (1972 Replacement Volume).

³⁵⁵ ACTS § 31-1-87.

³⁵⁶ W. VA. CODE ANN. § 31-1-37 (1972 Replacement Volume).

Acts require that shares be fully paid before certificates are issued.³⁵⁷

An increasing number of states have statutory provisions authorizing the issuance of fractions of shares.³⁵⁸ The pending Act specifically permits this in West Virginia.³⁵⁹ Traditionally, corporations have been authorized but not required to issue fractional shares. These fractional shares usually have the same rights, privileges, and limitations as the full shares, but only in proportion to their fractional ownership interests. Fractional share interests can result from share dividends, odd share splits, reverse share splits, conversions, mergers, consolidations, reclassifications, and corporate reorganizations.

A fraction of a share, under the pending Act, entitles the owner to vote, to receive dividends, and to participate in any of the corporate assets in event of liquidation. This represents a substantial change from the current law. Although the present Act impliedly authorizes fractional shares, it specifically prohibits voting rights to attach to them. No mention is made of other rights that may be associated with fractional shares; thus, it is questionable whether these rights vest in the shareholder.³⁶⁰

Many corporate statutes, including West Virginia's pending Act, authorize the issuance of scrip in lieu of fractional shares;³⁶¹ the present Act does not. Scrip is a certificate that can be exchanged for shares of stock, usually before a specified date. Under West Virginia's pending Act, scrip has a decided advantage over fractional shares in that it confers only the right, subject to time and other constraints as may be determined by the directors and set forth on the scrip certificate, to accumulate the scrip certificates in amounts equivalent to a full share and exchange them for a full share certificate.³⁶² Scrip may be issued in registered or bearer form and is transferable. The pending statute follows the customary practice of permitting the issuance of scrip subject to the condition that it shall become void if not exchanged for full shares before a specified date. It also permits the corporation to sell

³⁵⁷ *Id.*; Acts § 31-1-87.

³⁵⁸ 1 MODEL BUS. CORP. ACT ANN. § 16, ¶ 2 (2d ed. 1971).

³⁵⁹ Acts § 31-1-88. This section is identical to section twenty-four of the Model Business Corporation Act.

³⁶⁰ W. VA. CODE ANN. § 31-1-67 (1972 Replacement Volume).

³⁶¹ Acts § 31-1-88.

³⁶² *Id.*

the shares for which the scrip is exchangeable and to distribute the proceeds to the holders of the scrip. The board of directors can make the issuance of scrip subject to any other conditions they deem advisable.³⁶²

A cheaper and simpler method of handling fractional shares is for the corporation to authorize the sale of all fractional share interests at the outset rather than undergo the delay and expense of issuing scrip. The pending Act permits this by authorizing the corporation to "arrange for the disposition of fractional interests by those entitled thereto" and to "pay in cash the fair value of fractions of a share as of the time when those entitled to receive such fractions are determined."³⁶³ This method prevents the shareholder from benefiting from a subsequent increase in the price of the shares, but, on the other hand, it protects him against any subsequent decline in the market price of the stock.

In addition to the initial authorization and subsequent reissuance of shares, the pending Act authorizes a corporation to periodically sell shares to employees through stock option plans.³⁶⁴ A stock option plan is a form of incentive compensation premised upon the idea that good management results in higher share prices which render the share option valuable. Stock option plans often grant, by way of incentive or reward, specified officers and key employees of a corporation an option to purchase a certain number of shares of the corporation's stock at a price equal to the market value of the stock at the time of the granting of the option. Management is thereby, theoretically, induced to perform at high levels of efficiency in order to increase the value of the corporate enterprise and hence the price of its stock. However, stock option plans have been criticized as inducing large borrowings by executives who have no accumulated wealth, causing large liquidations of options that are exercised in order to repay the debt induced by the option opportunity, placing the executive in a speculative market, and subjecting him to risks during the six months long-term capital gain and insider-trading period.³⁶⁵

Although there is presently no statutory or case law authority in this state empowering a corporation to establish stock options or other employee incentive plans, these plans are likely legal by

³⁶³ *Id.*

³⁶⁴ Acts § 31-1-84.

³⁶⁵ H. HENN, *LAW OF CORPORATIONS* § 248, at 495 n.15 (2d ed. 1970).

virtue of a corporation's general authority to contract and to provide for the issuance of shares.

Stock options were made popular, in part at least, by the prohibitive income tax rates and limitations placed on corporate salaries during World War II. The Internal Revenue Code of 1950 treated the profit resulting from the sale of shares of stock purchased under restricted stock option plans as capital gain.³⁶⁶ A qualified share option is one granted to an employee by his employer corporation, or its parent or subsidiary corporation, to purchase shares of the corporation, but only if (1) the option is granted pursuant to a prescribed plan approved by the shareholders of the grantor corporation within twelve months before or after the date the plan is adopted, (2) the option is granted within ten years from the date of adoption or approval, whichever is earlier, (3) the option, by its terms, is not exercisable after five years from the grant of the option, (4) the option price, with certain exceptions, is not less than the fair market value of the shares at the time the option is granted, (5) the option, by its terms, is not exercisable while specified older options held by the grantee are outstanding, (6) the option, by its terms, is not transferable by the grantee otherwise than by will or the laws of descent and distribution and is exercisable, during his lifetime, only by him, and (7) the grantee, immediately after the grant of the option, does not own more than five percent (ten percent in certain small businesses) of the total combined voting power or value of all classes of the employer corporation or its parent or subsidiary corporation.³⁶⁷ Generally, the exercise of a stock option is neither taxable income to the employee nor a deduction for the employer corporation, and the amount paid under the option is deemed consideration received by the corporation for the shares.³⁶⁸

The pending Act specifically authorizes a corporation to implement stock option plans.³⁶⁹ Thus a corporation may create and issue stock rights entitling the holders to purchase shares of any class or classes of corporate stock. The issuance of stock options by the corporation may or may not be in connection with the issuance and sale of corporate stock or securities. The board of directors shall determine how the rights or options are to be evidenced. The

³⁶⁶ 1 MODEL BUS. CORP. ACT ANN. § 20, ¶ 2 (2d ed. 1971).

³⁶⁷ INT. REV. CODE OF 1954, § 422(b)(1)-(7).

³⁶⁸ *Id.* § 421.

³⁶⁹ Acts § 31-1-84. This section is identical to section twenty of the Model Business Corporation Act. The current Act has no comparable counterpart.

options must specify the terms upon which, the time within which, and the price at which the shares can be purchased upon the exercise of the option. If the options are not issued to all shareholders generally, the issuance must be authorized by an affirmative vote of a majority of the shareholders entitled to vote thereon or by a plan adopted by such shareholders. The pending Act reflects the prevailing corporate practice of requiring shareholders' approval of qualified stock option plans for officers, directors, and key employees. In the absence of fraud, the judgment of the board of directors as to the adequacy of consideration is conclusive. The price to be received for par value shares, except treasury shares, shall not be less than the par value thereof.³⁷⁰

b. Acquiring and Canceling Shares

The right of a corporation to acquire and dispose of its own shares was formerly prohibited in the United States. It was thought that the reacquisition of its own stock by a corporation did not fall within the realm of corporate purposes or that it might result in a reduction of capital without following proper procedural guidelines, thereby harming creditors. Today, however, all jurisdictions permit corporations to reacquire and dispose of their own stock subject to certain limitations.³⁷¹

The principle limitation imposed by the pending Act upon the corporate reacquisition of its own stock is that no such reacquisition can be made when the corporation is insolvent or when the purchase would render the corporation insolvent.³⁷² A corporation is insolvent when it is unable "to pay its debts as they become due in the usual course of its business."³⁷³ This restriction prevents a corporate stockholder from preferring himself to the disadvantage of corporate creditors. The pending Act also imposes a personal liability upon directors who violate this restriction.³⁷⁴ Thus, subject to the insolvency limitation, a corporation may acquire and dispose of its own shares, but only to the extent of unreserved and unrestricted earned surplus. The pending Act also permits corporate acquisition of its own shares from capital surplus with stockholder acclamation, expressed either by resolution adopted by

³⁷⁰ Acts § 31-1-84.

³⁷¹ 1 MODEL BUS. CORP. ACT ANN. § 6, ¶ 2 (2d ed. 1971).

³⁷² Acts § 31-1-83. This section is patterned after section six of the Model Business Corporation Act.

³⁷³ Acts § 31-1-6(k).

³⁷⁴ Acts § 31-1-102.

majority vote of all shares entitled to vote thereon or by permission granted in the articles of incorporation.³⁷⁵

The present Act accomplishes substantially the same results but with somewhat different language. The present code authorizes a corporation to acquire its own stock provided that such acquisition would not impair the capital of the corporation.³⁷⁶ This section has been construed as prohibiting the purchase by a corporation of its own stock if such purchase would lower the realizable value of its assets to a level below the total of its liabilities and capital.³⁷⁷ A corporate repurchase of its own stock that would render the corporation insolvent violates section thirty-nine of the present Act and constitutes a fraud upon subsequent and existing creditors. However, the United States Court of Appeals for the Fourth Circuit has held that this section does not need to be applied when no creditor would be adversely affected.³⁷⁸ The court's language reveals that the restriction imposed upon a corporate acquisition of its own stock has been developed primarily to protect the creditors of the corporation. While the pending Act defines the limitations imposed upon corporate acquisition of its own stock in somewhat more technical terms, the substantive law will be little affected. The primary result of the change in language will be to remove, at least to a limited extent, the court's burden of defining "an impairment of capital."

Although the language of this section of the pending Act is an improvement over that contained in the present code, use of the term "surplus" is not desirable from an accounting standpoint. This term connotes an excess or overage; in fact, no such meaning is intended when the term is used in an accounting sense.

Since 1941, the Committee on Terminology of the American Institute of Accountants has recommended the abandonment of the use of the term "surplus" and the substitution of more descriptive specific titles.³⁷⁹ The use of the term is an outmoded practice that rarely occurs within the accounting profession. To illustrate the misdescription that results from the use of the term "surplus," either in conjunction with earned surplus or capital surplus, con-

³⁷⁵ Acts § 31-1-83.

³⁷⁶ W. VA. CODE ANN. § 31-1-39 (1972 Replacement Volume).

³⁷⁷ *Mountain State Steel Foundries, Inc. v. Commissioner*, 284 F.2d 737 (4th Cir. 1960).

³⁷⁸ *Id.*

³⁷⁹ D. HERWITZ AND D. TRAUTMAN, *MATERIALS ON ACCOUNTING* 50 (3d ed. 1959).

sider the following example.³⁸⁰ The value of an enterprise may decline, forcing down the price of the corporation's stock. The corporation may then be able to reacquire a portion of its outstanding capital stock at a price less than the par value thereof. The subsequent retirement of this stock could result in a reduction of the corporation's legal capital below the amount expended therefor. If this occurs, following the terminology employed by the new code, a surplus account would be created. A decrease in value of a firm's common stock is usually associated with a decline in the value of the enterprise. Thus, the denomination of this new account created as a by-product of the company's declining value as "surplus" is a gross misdescription.

In 1949 the Committee on Accounting Terminology recommended, in part, that in the balance sheet presentations of stockholder's equity:

(1) The use of the term *surplus* (whether standing alone or in such combination as *capital surplus*, *paid-in surplus*, *earned surplus*, *appraisal surplus*, etc., be discontinued.

(2) The contributed portion of proprietary capital be shown as:

(a) Capital contributed for, or assigned to, shares to the extent of the par or stated value of each class of shares presently outstanding.

(b)(i) Capital contributed for, or assigned to, shares in excess of such par or stated value (whether as a result of original issue of shares at amounts in excess of their then par or stated value, or of a reduction in par or stated value of shares after issuance, or of transactions by the corporation in its own shares); and

(ii) Capital received other than for shares, whether from shareholders or from others.

(3) The term *earned surplus* should be replaced by terms which will indicate source, such as *retained income*, *retained earnings*, *accumulated earnings*, or *earnings retained for use in the business*. In the case of a deficit, the amount should be shown as a deduction from contributed capital with appropriate description.³⁸¹

In view of the stigmatized connotation of the term "surplus" when

³⁸⁰ *Id.*

³⁸¹ *Id.* at 470.

used in an accounting sense, the Legislature should have taken note of the accounting profession's view of the term and selected more descriptive terminology for this section of the code.

When shares that have been issued to shareholders are reacquired by the corporation, they are termed treasury shares. Treasury shares are ones that are authorized and issued but not outstanding. They are not part of the assets of the corporation. They are acquired with the ultimate idea of either cancellation or resale.³⁸²

Although there are several methods used to record treasury share transactions, the cost approach is most widely used. This method reflects treasury shares at cost as a subtraction from total capital recorded on the balance sheet. If treasury shares are sold at less than cost, the shrinkage in corporate capital is applied against any premium (inappropriately referred to as capital surplus by the code) that arose from the original sale of stock and any remaining shrinkage is applied against retained earnings (inappropriately referred to as earned surplus by the code). Thus, there exists the potential reduction of premium and retained earnings by the amount of shrinkage in corporate capital produced by the resale of treasury shares at less than cost. To reflect this contingency, the pending Act requires that each disposition of cash, or the equivalent, for the reacquisition of corporate shares shall be reflected by a corresponding restriction on capital surplus or earned surplus which will remain on the books until the shares are cancelled or resold.³⁸³

The pending Act permits a corporation to reacquire its own shares for certain express purposes notwithstanding the provision limiting general reacquisition to the unreserved earned or capital surplus. Whereas the current Act specifically prohibits a banking institution from purchasing its own shares,³⁸⁴ the pending Act allows all corporations to reacquire their own shares subject to the provisions concerning banking institutions³⁸⁵ and unless otherwise prohibited by law.

The pending Act provides that shares cannot be redeemed or purchased by a corporation when the corporation is either insol-

³⁸² H. HENN, *LAW OF CORPORATIONS* § 158, at 291 (2d ed. 1970).

³⁸³ Acts § 31-1-83.

³⁸⁴ W. VA. CODE ANN. § 31-1-39 (1972 Replacement Volume).

³⁸⁵ W. VA. CODE ANN. §§ 31A-1-1 to -18 (1972 Replacement Volume).

vent or would be rendered insolvent by the transaction or the net assets would be reduced below the aggregate amount payable to holders of senior shares that are preferred as to dissolution.³⁸⁶

This section is an outgrowth of the fundamental rule that a corporation shall not, through any means, transfer anything of value to shareholders prior to paying, or otherwise providing for, corporate creditors. This provision extends equal protection to the full extent of contractual rights of equal or senior classes of shares, including the full amount of any liquidation premium.³⁸⁷ Even though stock may be issued with a provision calling for a sinking fund or with a covenant to redeem, either at a fixed date or upon the occurrence of a specified contingency or upon the stockholder's demand, and regardless of how absolute in appearance these covenants may seem, they are nonetheless subject to the two fundamental limitations expressed in this provision.³⁸⁸

West Virginia's present Act expresses the limitation somewhat differently by requiring that assets remaining after redemption shall exceed the debts or liabilities of the corporation. The current Act also limits the price to be paid for redeemable shares to the redemption price shown in the articles of incorporation or contract.³⁸⁹

A simple procedure for cancelling shares that have been redeemed or purchased and reducing stated capital by the amount represented by the shares is provided by the pending Act.³⁹⁰ These provisions effectuate the normal corporate business expectation that redeemed shares are by that fact retired and that purchased shares are subject to retirement at the option of the board of directors without the need for shareholder action in either case.

When redeemable shares are redeemed or purchased, the corporation is under a mandatory duty to file a statement of cancellation with the Secretary of State. The stated capital of the corporation is automatically reduced by the amount which was represented by the cancelled shares. Concomittantly, they are restored to the status of authorized but unissued shares unless the articles

³⁸⁶ Acts § 31-1-112. This section is identical to section sixty-six of the Model Business Corporation Act.

³⁸⁷ 2 MODEL BUS. CORP. ACT ANN. § 66, ¶ 2 (2d ed. 1971).

³⁸⁸ Acts § 31-1-112.

³⁸⁹ W. VA. CODE ANN. § 31-1-40 (1972 Replacement Volume).

³⁹⁰ Acts §§ 31-1-113 and 31-1-114. These sections are identical to sections sixty-seven and sixty-eight of the Model Business Corporation Act.

of incorporation prohibit their reissuance, in which event the filing of the statement of cancellation amends the charter and reduces by that amount the number of shares of the class that the corporation is authorized to issue.³⁹¹

On the other hand, when non-redeemable shares are reacquired by the corporation, there is no automatic requirement calling for their cancellation. The board of directors can cancel the shares, hold them in the treasury, or resell them. If the board of directors chooses the first of these courses, it authorizes the execution and filing of a statement of cancellation. Upon filing this statement with the Secretary of State, stated capital is immediately reduced by the amount then represented by the cancelled shares, and they are automatically restored to the status of authorized but unissued shares unless the articles of incorporation provide that such shares shall not be reissued, in which case the statement of cancellation shall reduce the authorized shares.³⁹²

Non-redeemable shares are ordinarily reacquired only through purchases. Under authority of the pending Act, this may be done only to the extent of unreserved and unrestricted earned surplus available therefor, or, if the articles expressly so provide or the holders of at least a majority of the shares entitled to vote thereon so authorize, to the extent of the unreserved and unrestricted capital surplus available for that purpose.³⁹³ The effect of this section of the pending Act is to make surplus so used unavailable for further purchases of shares or for the payment of dividends, because it remains restricted as long as such shares are held as treasury shares. However, the amount of stated capital is not reduced by the transaction, and the transaction is viewed as if incomplete. It may be completed by either the cancellation of such shares, which immediately reduces stated capital by a like amount and eliminates the restriction on earned surplus, or by disposition of the shares, which leaves stated capital unchanged but automatically eliminates the restriction on earned surplus.

West Virginia's current Act authorizes corporations to purchase, hold, sell, and transfer shares of their own capital stock so long as such transactions do not cause any impairment of the capital of the corporation.³⁹⁴ However, this provision does not apply

³⁹¹ Acts § 31-1-113.

³⁹² Acts § 31-1-114.

³⁹³ Acts § 31-1-83.

³⁹⁴ W. VA. CODE ANN. § 31-1-39 (1972 Replacement Volume).

to or authorize a banking institution to purchase its own shares.³⁹⁵ The shares redeemed or purchased, under the present Act, have the status of authorized and unissued shares of the class of stock to which such shares belonged.³⁹⁶ The pending Act does not make a distinction between banking institutions and other corporations organized for profit, thereby impliedly permitting banking institutions to redeem or purchase their stock.³⁹⁷ The current code also authorizes any corporation except banking institutions to redeem or purchase redeemable shares at such times and prices as are stated in the charter but not exceeding the redemption price and only if the assets remaining after the redemption or purchase are sufficient to pay the corporate debts.³⁹⁸

c. Capital

Stated capital is the sum of the par value of all par value shares that have been issued, the amount of consideration received for no-par shares that has been allocated to stated capital rather than surplus, and any amounts that have been transferred to stated capital, either upon a distribution of shares as a share dividend or otherwise, minus all reductions from such sums as have been effected in a manner permitted by law.³⁹⁹ The pending Act provides that the consideration received for par-value shares shall constitute stated capital to the extent of the par value of the shares, and the excess, if any, shall constitute capital surplus.⁴⁰⁰ In the case of no-par shares, the entire amount received as consideration in exchange for the shares is to be treated as stated capital unless the board of directors, within sixty days after the issuance of the shares, allocates some portion of the consideration received to capital surplus. However, the board of directors can allocate to capital surplus only that portion of the consideration received for no-par shares having a preference in the corporate assets upon involuntary liquidation that exceeds the amount of the preference.⁴⁰¹

³⁹⁵ *Id.*

³⁹⁶ W. VA. CODE ANN. § 31-1-40 (1972 Replacement Volume).

³⁹⁷ *But see* W. VA. CODE ANN. § 31A-8-5 (1972 Replacement Volume).

³⁹⁸ *Id.* § 31-1-40.

³⁹⁹ Acts § 31-1-85. This section is identical to section twenty-one of the Model Business Corporation Act. The current code contains no provision concerning the amount of consideration to be allocated to stated capital.

⁴⁰⁰ See the text accompanying notes 379-381 *supra* for criticism of the use of the term "surplus." Better terminology to designate the consideration received in excess of the par value of the stock is "paid in capital in excess of par."

⁴⁰¹ Acts § 31-1-85.

The pending Act also permits an allocation to earned surplus, rather than to capital surplus, in the event of a merger, consolidation, or similar transaction.⁴⁰² For example, the value of the assets acquired through the merger may exceed the par value of the newly issued shares. Under the pending Act, this excess would be treated as capital surplus. However, the pending statute permits an allocation to earned surplus of not more than the aggregate earned surpluses of the constituent corporations.⁴⁰³ This provision was prompted by the adoption of the pooling of interests concept by the accounting profession. A pooling of interests is a combination of two or more corporations in which the owners of the old corporations become the owners of the resulting single corporation in basically the same proportion. A premise underlying the pooling of interest concept is the continuity of the various old businesses in the new entity, including a continuity of management. A pooling of interest is to be distinguished from a purchase, which is a combination of two or more corporations resulting in the elimination of an important part of the ownership interest in the acquired corporation. Factors indicating a purchase are a disproportionate distribution of shares and voting rights in the resulting corporation or a plan to retire a substantial part of the capital stock issued to the owners of one of the old corporations. If one of the constituent corporations emerges as clearly dominant, this creates a presumption that the transaction is a purchase rather than a pooling of interest. The distinction is important, because, in a pooling of interest, the assets are recorded as they appear in the books of account of each of the corporations immediately before the pooling. On the other hand, in a purchase, the acquired assets are recorded at cost.⁴⁰⁴

The pending Act, although covering all forms of business combinations, does not incorporate the substantial continuity of management or any other judgment tests applied by accountants in determining the appropriate method of handling these transactions. The statutory provisions regarding mergers, consolidations, and similar transactions is much broader than the accounting treatment afforded such combinations. This provision should be construed as a conceptual scheme of legislative permission within which the corporate enterprise can function rather than as a pre-

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ H. SELLIN, ATTORNEY'S PRACTICAL GUIDE TO ACCOUNTING 11-27 (1965).

scription as to the exact manner in which it shall be done.⁴⁰⁵ Since the accounting profession considers that both the purchase method and the pooling of interests method are acceptable in accounting for business combinations, although not as alternatives in accounting for the same business combination, the corporate entity will have to look past the code and to the accounting profession in order to determine the exact and proper manner in which a particular business combination will be handled within the legislative constraints of the pending Act. The new Act also authorizes the board of directors to increase stated capital by transferring to stated capital a portion of the earned or capital surplus.⁴⁰⁶

Although this portion of the pending Act fills a void in West Virginia corporate law, it should create no new procedures or methods of determining the amount of consideration received by a corporation in exchange for its shares which must be included in stated capital. These methods, in reality, have been and will continue to be determined by sound accounting principles.

The pending Act authorizes dividends to be paid only to the extent of unreserved or unrestricted surplus.⁴⁰⁷ However, distributions of cash or other property may be made to the extent of capital surplus if: the articles permit, the distributions will not make the corporation insolvent, all cumulative dividends have been paid, the distribution will not reduce the corporation's net assets below the amount necessary to pay the liquidation value of all preference shares, and the fact that capital surplus is being distributed is explained to the shareholders.⁴⁰⁸ The flexibility provided by this portion of the pending Act permits a corporation, with certain safeguards, to pay "dividends" from either earned or capital surplus.

The use of capital surplus to discharge cumulative dividend obligations is also authorized when earned surplus is unavailable.⁴⁰⁹ This enables the enterprise to prevent an accumulation of dividend arrearages that could impair its financial position. In order to avoid any misconception, each such disposition must be

⁴⁰⁵ 1 MODEL BUS. CORP. ACT ANN. § 21, ¶ 2 (2d ed. 1971).

⁴⁰⁶ Acts § 31-1-85.

⁴⁰⁷ Acts § 31-1-99.

⁴⁰⁸ Acts § 31-1-100. This section is identical to section forty-six of the Model Business Corporation Act. Section seventy of the current code contains the provisions regarding distributions from capital surplus.

⁴⁰⁹ Acts § 31-1-100.

properly identified as a payment of cumulative dividends from capital surplus.⁴¹⁰

The current Act permits the payment of dividends from the net profits of the corporation or from any surplus arising from a reduction of capital.⁴¹¹ It has no provision for cumulative dividends from capital surplus.

A corporation often desires to reduce stated capital for one of two reasons—either to disburse to shareholders amounts greater than would otherwise be permissible or to eliminate a deficit in earned or capital surplus. The reduction in stated capital creates a corresponding capital surplus which may be distributed to shareholders or applied against an existing deficit. If the deficit is in the earned surplus account, the newly created capital surplus may be applied against it by resolution of the board of directors.⁴¹² A reduction of stated capital also follows a redemption or purchase of redeemable shares and may follow a reacquisition of non-redeemable shares as prescribed by sections 114 and 115.

The only restriction on the right to reduce stated capital in this fashion is that the remaining amount may not be less than the aggregate preferential amount payable upon issued shares having a preferential right in the event of involuntary dissolution plus the par value of all other issued shares.⁴¹³ This corresponds to the restriction on the right to redeem or purchase redeemable shares as permitted by section 112 of the pending Act. A reduction of stated capital under this section can be accomplished only through special corporate proceedings that require a majority vote of the shareholders and the filing of a statement of reduction with the Secretary of State.⁴¹⁴

West Virginia's current Act prescribes special proceedings for the reduction of stated capital. Stated capital may not be reduced by more than the amount that stated capital exceeds the par value of shares outstanding which have a par value plus the liquidation preference, if any, of shares without par value.⁴¹⁵ The current Act also contains special procedures for reducing stated capital by re-

⁴¹⁰ *Id.*

⁴¹¹ W. VA. CODE ANN. § 31-1-70 (1972 Replacement Volume).

⁴¹² Acts § 31-1-116.

⁴¹³ Acts § 31-1-115. This section is identical to section sixty-nine of the Model Business Corporation Act.

⁴¹⁴ Acts § 31-1-115.

⁴¹⁵ W. VA. CODE ANN. § 31-1-13(a) (1972 Replacement Volume).

ducing the par value of outstanding shares.⁴¹⁶ The pending Act provides that this type of reduction shall be accomplished through an amendment to the articles of incorporation in order to reduce simultaneously the par value of shares and stated capital.⁴¹⁷

The present Act also prescribes special proceedings for reducing stated capital through an exchange of shares having a lesser par value and portion of stated capital than those shares received by the corporation in the exchange.⁴¹⁸ The pending Act provides for reduction of stated capital under these circumstances by amending the articles of incorporation.⁴¹⁹

Additionally, the present Act authorizes stated capital to be reduced by cancellation of redeemed and other reacquired shares.⁴²⁰ The new Act handles the reduction of stated capital from the cancellation of redeemed and other reacquired shares in sections 113 and 114.⁴²¹ The procedure under the present Act for reducing stated capital other than by amendment of the articles of incorporation requires approval by a vote or written consent of the holders of a majority of outstanding shares regardless of limitations or restrictions on voting rights.⁴²²

The pending Act requires the corporation to file duplicate original statements of reduction with the Secretary of State who must approve them by endorsing thereon the word "Filed" and the date of the filing. The Secretary then files one of the duplicates in his office and returns the other to the corporation.⁴²³ This procedure is substantially the same as that required under the present Act.⁴²⁴ However, the current Act provides that notice of the reduction of stated capital must be published.⁴²⁵ As previously noted, the current code requires that after the reduction in stated capital, the remaining corporate assets must be sufficient to pay the corporate debts not otherwise provided for.⁴²⁶

As noted earlier, stated capital is the amount contributed for

⁴¹⁶ *Id.*

⁴¹⁷ Acts § 31-1-106(e).

⁴¹⁸ W. VA. CODE ANN. § 31-1-13(a) (1972 Replacement Volume).

⁴¹⁹ Acts § 31-1-106(f).

⁴²⁰ W. VA. CODE ANN. § 31-1-13(a) (1972 Replacement Volume).

⁴²¹ See the text accompanying notes 390 to 392 *supra*.

⁴²² W. VA. CODE ANN. § 31-1-13(a) (1972 Replacement Volume).

⁴²³ Acts § 31-1-115.

⁴²⁴ *Id.*; W. VA. CODE ANN. § 31-1-13(a) (1972 Replacement Volume).

⁴²⁵ W. VA. CODE ANN. 31-1-13(a) (1972 Replacement Volume).

⁴²⁶ *Id.*

or assigned to shares of stock outstanding to the extent of their par or stated value. Capital surplus includes all amounts contributed for, or assigned to, shares in excess of their par or stated value. The pending Act provides that the surplus created by a reduction of stated capital shall be capital surplus.⁴²⁷ It also authorizes the board of directors to increase the capital surplus of the corporation by transferring earned surplus to capital surplus.⁴²⁸ While the mechanics of this portion of the pending Act are appropriate enough, the choice of terminology leaves much to be desired. As discussed in connection with another provision of the pending Act, the use of the term "surplus" to describe any element of stockholder's equity is misleading. A more descriptive phrase for capital surplus would be "capital in excess of par or stated value" as the case may be. "Retained earnings" is a more preferable term than "earned surplus."

The pending Act also authorizes the board of directors to eliminate any deficits by offsetting these deficits first against earned surplus, to the extent thereof, and then against capital surplus.⁴²⁹ The requirement that earned surplus be eliminated before applying capital surplus to the reduction or elimination of any remaining deficit is necessary to prevent a reduction of capital to wipe out a deficit while still retaining an illusory earned surplus.

The pending Act authorizes the board of directors to create and abolish a reserve from earned surplus for proper purpose.⁴³⁰ The amount of earned surplus reserved is not available for dividends or other corporate distributions except as expressly permitted by the pending Act. This authorization to create reserves provides the flexibility that is essential for smooth management of complex corporate enterprises.

2. *Nonprofit Corporations*

The pending Act allows a nonprofit corporation to issue shares of stock.⁴³¹ This is a change from both the current practice with nonstock corporations and the Model Non-Profit Corporation Act

⁴²⁷ Acts § 31-1-116. This section is identical to section seventy of the Model Business Corporation Act. The current West Virginia Code contains no comparable provision.

⁴²⁸ Acts § 31-1-116.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ Acts § 31-1-144.

from which the nonprofit sections of the West Virginia Corporation Act are patterned.⁴³²

Even if a nonprofit corporation issues shares of stock, it is forbidden to distribute a dividend or pay any profit.⁴³³ Also, without a contrary provision in the bylaws or articles of incorporation, each member is allowed only one vote regardless of the number of shares that each member owns.⁴³⁴

Although no inherent danger appears from a nonprofit corporation's ability to issue stock, such an issuance would raise several issues. It is unclear what effect restrictions on transferability of the stock or an active trading in the stock for profit might have on the corporation's nonprofit status. One authority points out that issuing stock in nonprofit corporations is a disappearing custom and recommends that nonprofit corporations not issue stock.⁴³⁵ Other provisions of the pending Act allow the nonprofit corporation to achieve any purpose that it might desire through the creation of different classes of membership.⁴³⁶ Considering all of this, the change made in the pending Act does not seem justified.

E. Amending Articles of Incorporation

Because of growth, consolidation, or poor initial drafting, it often becomes necessary for both business and nonprofit corporations to amend their articles of incorporation. Both the pending and current Acts state that the articles may be amended to include anything which might have been contained in the original articles.⁴³⁷ Although the pending Act prescribes several other ways that the articles of incorporation may be amended by a business corpo-

⁴³² W. VA. CODE ANN. § 31-1-4a (1972 Replacement Volume); ALI MODEL NON-PROFIT CORPORATION ACT § 26 (1957). The pending Act and the model Act provisions are identical except for the first sentence. The pending Act reads, "Corporations may have or issue shares of stock." The first sentence of section twenty-six of the model Act states, "A corporation shall not have or issue shares of stock."

⁴³³ Acts § 31-1-144.

⁴³⁴ See Acts §§ 31-1-137, -138. These sections of the pending Act allow the voting rights of each member to be fixed by the articles of incorporation and the bylaws. From the language of sections 137 and 138, it appears that the bylaws or articles of incorporation could grant members one vote for each share of stock held.

⁴³⁵ H. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* (2d. ed. 1965).

⁴³⁶ See Acts § 31-1-137.

⁴³⁷ Acts §§ 31-1-106, -146; W. VA. CODE ANN. § 31-1-11 (1972 Replacement Volume).

ration, this should not change the current practice since the additional amendments listed could also be effected under the current Act.⁴³⁸ The practical effect of the pending Act's provisions in this area is to allow the practitioner to be on firmer ground when advising his corporate clients.

In the case of a business corporation, the resolution urging an amendment of the articles of incorporation must originate and be initially adopted by the board of directors.⁴³⁹ If the shares of stock have not yet been issued, the resolution passed by the board of directors is effective as an amendment.⁴⁴⁰ If shares have been issued, the amendment must be adopted by a majority vote of the shareholders. In addition, when the amendment to the articles of incorporation would affect any particular class of shareholders, the amendment must also receive a majority vote of shares in that class.⁴⁴¹ This procedure alters the current practice in several ways. First, the current Act provides for a majority vote in most instances, but it requires that a two-thirds approval be obtained when there is only one class of stock and the proposed amendment would either increase or decrease the amount of the authorized capital stock or would increase or decrease its par value.⁴⁴² Secondly, the current Act requires that the amendment be approved by a class vote only when it would change the preferences of shares of such class, increase or decrease the aggregate number of authorized shares of such class, or increase or decrease the par values of such class.⁴⁴³ Since the pending Act lowers the percentage of votes required to pass an amendment in many instances and increases the times when a class vote is authorized, the net effect is difficult to judge. The lowering of the percentage of votes required is probably the more significant of the two changes; therefore, the net effect

⁴³⁸ Both Acts specifically provide that the articles may be amended to: (1) change the corporate name; (2) change, enlarge, or diminish the corporate purposes; (3) increase or decrease its authorized capital stock; (4) increase or decrease the par value of authorized stock; (5) classify or reclassify the authorized stock; (6) change the designations, preferences, limitations, and relative rights of the authorized stock; and (7) change shares with par value into shares without par value, and to change shares without par value into shares with a par value. Acts § 31-1-106; W. VA. CODE ANN. § 31-1-11 (1972 Replacement Volume). The pending Act lists nine other ways that the articles may be amended.

⁴³⁹ Acts § 31-1-107. The current Act does not mention where the amendment must originate.

⁴⁴⁰ *Id.*

⁴⁴¹ Acts § 31-1-108.

⁴⁴² W. VA. CODE ANN. § 31-1-12 (1972 Replacement Volume).

⁴⁴³ *Id.*

may well be to make corporate recapitalization an easier task.

Amendments to the articles of incorporation of a nonprofit corporation may be adopted directly by a majority vote of all the directors in office if there are no members or if no members are entitled to vote on such amendment.⁴⁴⁴ Otherwise, to be valid, an amendment must be adopted in a resolution by the board of directors which states the proposed amendment and directs that it be submitted for vote to all the members entitled to vote thereon at either a regular or special meeting. Each member must be given written notice of the nature of the proposed amendment in the manner provided in the pending Act. A majority of members present is required to adopt such an amendment.⁴⁴⁵

After the articles of amendment have been properly adopted by a business corporation, they must be filed with the Secretary of State.⁴⁴⁶ Under the current Act, the president or vice-president must certify to the Secretary of State that the charter was correctly amended.⁴⁴⁷ The pending Act, however requires that the certification contain more detail. The amendment must be executed in duplicate by both the president or vice-president and the secretary or an assistant secretary and verified by one of the officers signing the amendment. The amendment as verified must contain: (1) the name of the corporation; (2) the amendment as adopted; (3) the date of adoption; (4) the number of shares outstanding and exactly what shares or classes are entitled to vote; and (5) the number of shares voted for and against each amendment, including class votes.⁴⁴⁸

In addition, if the amendment provides for an exchange, reclassification, or cancellation of issued shares, the amendment itself, or a statement accompanying it, must state the manner in which the exchange, reclassification, or cancellation will be accomplished. If the amendment to the articles of incorporation changes the amount of stated capital, the amendment must set forth the manner that the capital is affected and the dollar amount of the capital that is changed.⁴⁴⁹

In the case of nonprofit corporations, before submitting the

⁴⁴⁴ Acts § 31-1-147.

⁴⁴⁵ *Id.*

⁴⁴⁶ Acts § 31-1-31.

⁴⁴⁷ W. VA. CODE ANN. § 31-1-12 (1972 Replacement Volume).

⁴⁴⁸ Acts § 31-1-109.

⁴⁴⁹ *Id.*

articles of amendment, the president or vice-president and the secretary or assistant secretary must execute them in duplicate.⁴⁵⁰ The articles of amendment must contain the name of the corporation and the amendment as adopted. When the amendment is one that must be approved by members of the corporation, the articles of amendment must state that a quorum of members was present and that the amendment was approved by a majority of the members represented at the meeting and entitled to vote, or it must include a statement signed by all members entitled to vote thereon affirming their approval of the amendment. If there are no members, or no members entitled to vote thereon, the articles of amendment must include a statement of this fact plus the date on which the board of directors approved the amendment. There must also be included a statement that such amendment was adopted by a majority vote of all directors in office.⁴⁵¹

After the amendment to the articles of incorporation has been properly submitted to the Secretary of State, the procedure which is followed for both business and nonprofit corporations is identical to that followed after the filing of the original articles of incorporation.⁴⁵² An amendment to the articles of incorporation takes effect upon the Secretary of State's issuance of the certificate of amendment. However, no amendment can affect any existing cause of action or any pending claim.⁴⁵³

If a business corporation has properly amended its articles of incorporation, the corporation may have such amendment incorporated into the articles themselves by a resolution adopted by the board of directors.⁴⁵⁴ This resolution must be executed and submitted with the same formalities as any amendment to the articles of incorporation. In addition, the restated articles must be accompanied by a resolution stating that the restated articles of incorporation supersede the original articles of incorporation and all amend-

⁴⁵⁰ Acts § 31-1-148.

⁴⁵¹ *Id.*

⁴⁵² Acts § 31-1-31. See the discussion concerning filing of the original articles of incorporation in section II of this article.

⁴⁵³ Acts § 31-1-32.

⁴⁵⁴ Acts § 31-1-110. The current Act has a similar provision. W. VA. CODE ANN. § 31-1-7a (1972 Replacement Volume). If the articles as restated would contain an amendment not previously adopted, then both the current and pending Acts allow the amendment to be adopted and the articles to be restated in one step if the corporation is a business corporation. Acts §§ 31-1-110, -149; W. VA. CODE ANN. § 31-1-7a (1972 Replacement Volume).

ments thereto.⁴⁵⁵ This eliminates many of the facts which are currently required to be stated. However, the change is only procedural and will have no substantive effect.

The process that a nonprofit corporation must follow to restate its articles of incorporation is different than both the pending procedure for business corporations and the prior procedure for non-stock corporations.⁴⁵⁶ If there are members who are entitled to vote upon the restated articles of the nonprofit corporation, the board of directors must adopt a resolution containing the restated articles and calling for a vote of the members at either a regular or special meeting. Written notice must be given to each member. This notice, in addition to advising the members of the time and place for meeting, must contain either the actual restatement or a summary thereof. If there are no members, or no members entitled to vote thereon, the restated articles may be adopted by a simple majority vote of the directors in office. The resolution as adopted by the board of directors can contain no amendments which have not previously been properly adopted.⁴⁵⁷ This, in effect, requires the members of the nonprofit corporation to readopt amendments that they previously have approved. The defeat of such a restatement of the articles of incorporation would not affect the prior adopted amendment; it would merely defeat the restatement of the articles of incorporation. It appears that this absurdity could be avoided by inserting, either in the bylaws or articles of incorporation, a provision that members of the corporation are not entitled to vote upon a proposed restatement of the articles if such proposal contains no new amendments.⁴⁵⁸

Upon adoption, the restated articles must be certified to the Secretary of State in the same manner as an amendment to the articles.⁴⁵⁹ Such resolution must contain the name of the corporation, the period of duration, and the purpose for which it is organized. The resolution as certified to the Secretary of State must contain a statement declaring that the restated articles correctly set forth the provisions as amended and that such restatement supersedes the original articles of incorporation.⁴⁶⁰

⁴⁵⁵ Acts § 31-1-110.

⁴⁵⁶ Acts § 31-1-149; W. VA. CODE ANN. § 31-1-7a (1972 Replacement Volume).

⁴⁵⁷ Acts § 31-1-149.

⁴⁵⁸ Such a provision in the articles of incorporation appears to be allowable under Acts §§ 31-1-138, -149.

⁴⁵⁹ Acts § 31-1-148.

⁴⁶⁰ Acts § 31-1-149. The resolution must be submitted to the Secretary of State in duplicate. Acts § 31-1-33.

In both business and nonprofit corporations, the restated articles become effective and supersede the prior articles of incorporation upon the issuance of the restated certificate of incorporation. However, the Secretary of State is not authorized to issue the restated certificate until all of the required fees have been paid.⁴⁶¹ The procedure for certification by the Secretary of State and for recordation with the appropriate county clerk is exactly the same as with the original articles of incorporation.⁴⁶²

An entirely new concept is presented by the provision in the pending Act that allows the articles of incorporation of a business corporation to be amended by court order where, through some judicial determination, the business corporation has been forced to reorganize.⁴⁶³ Under such circumstances, the articles of incorporation may be amended in any manner necessary to carry out such a plan as long as the provisions of the amendment could have lawfully been contained in its initial articles of incorporation. Any amendments to the articles of incorporation must be approved by the court ordering such reorganization and verified in duplicate by such person as the court shall appoint. Such amendments are to be verified by the Secretary of State and filed with the proper county clerk as provided for in the provisions concerning the original articles of incorporation.⁴⁶⁴ The amendments are in effect upon the issuance of a certificate by the Secretary of State, and no action by the board of directors or shareholders is necessary.⁴⁶⁵

F. Corporate Combinations

Merger and consolidation refer to the combination of two or more separate corporations in accordance with the detailed procedures established by the corporation laws of each state. Mergers and consolidations were not permitted at common law.⁴⁶⁶ Thus specific statutory authority to merge or consolidate is a prerequisite for these types of corporate combinations.⁴⁶⁷

The procedures under state laws for mergers and consolida-

⁴⁶¹ Acts § 31-1-33. Section seventy-six of the pending Act refers to W. VA. CODE ANN. § 59-1-2 (Cum. Supp. 1974), for a list of the required fees.

⁴⁶² Acts § 31-1-28.

⁴⁶³ Acts § 31-1-111.

⁴⁶⁴ Acts § 31-1-28.

⁴⁶⁵ Acts § 31-1-111.

⁴⁶⁶ *E.g.*, *Colgate v. United States Leather Co.*, 75 N.J. Eq. 229, 72 A. 126 (1909).

⁴⁶⁷ *Id.*

tions are virtually identical; the only real difference being the outcome of the transaction.⁴⁶⁸ In a merger, one corporation continues by merging into itself another corporation that then ceases to exist. In a consolidation, all of the constituent corporations join together and disappear into a new, consolidated corporation.⁴⁶⁹ When everything is considered, mergers and consolidations are extremely complicated procedures with consequences involving all areas of corporate activity. Therefore, it is the intent of most modern corporate laws to keep the actual mechanics for mergers and consolidations as simple as possible.

The pending West Virginia corporation laws, while simpler in many respects, are not much different from the current procedures, at least so far as the actual mechanics of the combinations go.⁴⁷⁰ Basically, the pending Act provides that the board of directors of each corporation must adopt a resolution approving a plan of merger which must include the names of the corporations involved, the terms and conditions of the merger, the method for converting the stock of each corporation, a statement of any changes to be made in the articles of incorporation of the surviving corporation, and such other provisions as are deemed necessary or desirable.⁴⁷¹ Following the adoption of the merger resolution by the board of directors, the proposal must be voted upon and approved by the holders of a majority of the shares of each corporation. Unlike present West Virginia practice which requires a special meeting of the shareholders to be called for this purpose,⁴⁷² the pending Act provides that the resolution may be brought for shareholder approval at either a special or an annual meeting.⁴⁷³

It is also to be noted that only a majority of the shares outstanding are needed for approval of the merger plan,⁴⁷⁴ whereas the present law requires approval by two-thirds of the outstanding shares.⁴⁷⁵ The current law requires two-thirds because it was formally believed that a fundamental change in corporate existence,

⁴⁶⁸ H. HENN, *LAW OF CORPORATIONS* § 346, at 713 (2d ed. 1970).

⁴⁶⁹ See, e.g., *Personal Credit Plan v. Kling*, 130 N.J. Eq. 41, 45, 20 A.2d 704, 706 (1941); *Metropolitan Edison Co. v. Commissioner*, 98 F.2d 807, 810 (1938); *Pinellas Ice & Cold Storage Co. v. Commissioner*, 57 F.2d 188, 190 (1932).

⁴⁷⁰ See W. VA. CODE ANN. § 31-1-63 (1972 Replacement Volume).

⁴⁷¹ Acts §§ 31-1-34, -35.

⁴⁷² W. VA. CODE ANN. § 31-1-63 (1972 Replacement Volume).

⁴⁷³ Acts § 31-1-117.

⁴⁷⁴ *Id.*

⁴⁷⁵ W. VA. CODE ANN. § 31-1-63 (1972 Replacement Volume).

such as a merger or consolidation, should require more than a bare majority for approval. The change results from the present, more desirable viewpoint that a minority should not be able to block the wishes of the majority; in addition, the pending law provides for other measures which will have a greater effect in protecting the interests of the minority.⁴⁷⁶

The pending procedures require a vote of not only the capital stock but of all "shares entitled to vote thereon," with the further provision that if any class of shares is entitled to vote as a class, a majority of the shares of each class is required for approval.⁴⁷⁷ The statute explains that any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class. Primarily this involves changes in the number, value, or rights represented by shares of stock.⁴⁷⁸

The pending corporate laws add another twist to the procedures for merger and consolidation by allowing the corporation to abandon the plan.⁴⁷⁹ Even after the plan for merger is approved by an affirmative vote of the stockholders and up until the filing of the articles of merger with the Secretary of State, the plan may be completely abandoned pursuant to provisions for abandonment which may be set forth in the plan of merger. Such an option is of great utility, because mergers and consolidations have many consequences, such as tax liability, assumptions of labor agreements, contract rights, pension and profit sharing plans, and problems with the appraisal and purchase of dissenting shareholders' stock, any one of which could make an agreement to merge too costly to carry out.⁴⁸⁰

Following approval by the shareholders, duplicate originals of the articles of merger or consolidation must be delivered to the Secretary of State, and if the Secretary finds everything in order,

⁴⁷⁶ The new procedures allow for the appraisal of shares and redemption by the corporation of those minority shareholders who are unhappy with the merger or consolidation. See the text accompanying notes 516-34 *infra*.

⁴⁷⁷ Acts § 31-1-117.

⁴⁷⁸ Acts § 31-1-108. For analysis of this provision, see the text accompanying note 441, *supra*.

⁴⁷⁹ Acts § 31-1-117.

⁴⁸⁰ For a good analysis of all the factors which must be considered when a merger or consolidation is anticipated, see A. CHOKA, *BUYING, SELLING, AND MERGING BUSINESSES* (3d ed. 1969).

he will file one of the duplicate originals in his office and issue a certificate of merger or consolidation with the other and return both the duplicate original and the certificate to the merged or consolidated corporation.⁴⁸¹ The certificate of merger or consolidation must then be recorded in the office of the appropriate county clerk.⁴⁸²

When the certificate of merger is issued by the Secretary of State, the merger is "effected."⁴⁸³ From this point in time, there shall be only a single merged or consolidated corporation,⁴⁸⁴ and the constituent corporations shall go out of existence.⁴⁸⁵ The surviving or new corporation shall have "all of the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this article."⁴⁸⁶ Also the new or surviving corporation shall have all of the rights, privileges, and property of the constituent corporations and be subject to all the liabilities and obligations of the constituents.⁴⁸⁷ Finally, the plan of merger or consolidation shall become either amendments to the articles of incorporation, in the case of a merger, or the original articles of the consolidated corporation.⁴⁸⁸

Like current West Virginia corporate law,⁴⁸⁹ the pending Act provides that in a merger or consolidation, deeds must be prepared conveying any real estate held by any of the constituent corporations to the surviving or consolidated corporation.⁴⁹⁰ There is no such provision in the Model Business Corporation Act,⁴⁹¹ and, indeed, this provision seems alien to the intent and purpose of the pending Act. In a previous paragraph the pending Act provides that "all property . . . shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed. . . ."⁴⁹² The task of preparing and executing deeds to all of the parcels of land that may be owned by the constituent corpora-

⁴⁸¹ Acts § 31-1-36.

⁴⁸² *Id.*

⁴⁸³ Acts § 31-1-37(a).

⁴⁸⁴ Acts § 31-1-37(a)(1).

⁴⁸⁵ Acts § 31-1-37(a)(2).

⁴⁸⁶ Acts § 31-1-37(a)(3).

⁴⁸⁷ Acts § 31-1-37(a)(4), (5).

⁴⁸⁸ Acts § 31-1-37(a)(6).

⁴⁸⁹ W. VA. CODE ANN. § 31-1-63b (1972 Replacement Volume).

⁴⁹⁰ Acts § 31-1-37(b).

⁴⁹¹ See 2 MODEL BUS. CORP. ACT ANN. § 76 (2d ed. 1971).

⁴⁹² Acts § 31-1-37(a)(4).

tions will be time consuming, complicated, expensive, and totally unnecessary.

Although the purpose of this provision is not entirely clear, it seems that the best explanation is that it will aid the title examiner or creditor in checking the records. There can be, however, better methods to accomplish this purpose without sacrificing the simplicity, and thus the utility, of the merger and consolidation statutes. A copy of the certificate of merger or consolidation should be required to be recorded in each county where any of the constituent corporations own property, and the county clerk should be required to index this certificate in the grantor-grantee indices with appropriate reference to the articles of incorporation books. Through these simple steps, the title examiner's task is not complicated, and the utility and simplicity of the merger and consolidation statutes are retained.

As in the present corporation laws,⁴⁹³ the pending Act has a provision allowing the merger of a subsidiary corporation into the parent corporation without a vote of the shareholders.⁴⁹⁴ This so-called "short merger" statute permits such a merger if the parent owns at least ninety per cent of the subsidiary's shares.⁴⁹⁵ Indeed, in such a situation a vote of the shareholders of either corporation would merely be a formality. Under the current West Virginia practice, a "short merger" can only be effected if the parent corporation owns one hundred percent of the subsidiary's shares. The pending Act more realistically allows up to ten percent of the subsidiary's shares to be owned by outsiders, thus allowing for the situation where the parent corporation has been unable to acquire all of the subsidiary's shares. These minority shareholders do have the remedy of having their shares appraised and redeemed by the corporation.⁴⁹⁶ This is more equitable than allowing a small number of shareholders to block the right of the majority to use the "short merger" statute.

The "short merger" statute does have one drawback, however; it makes it very easy for a corporation to get rid of unwanted minority shareholders in the subsidiary.⁴⁹⁷ This is accomplished by

⁴⁹³ W. VA. CODE ANN. § 31-1-63a1 (1972 Replacement Volume).

⁴⁹⁴ For a discussion of these types of statutes and their consequences, see Note, *The Short Merger Statute*, 32 U. CHI. L. REV. 596 (1965); Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630 (1961).

⁴⁹⁵ Acts § 31-1-119.

⁴⁹⁶ See text accompanying note 517 *infra*.

⁴⁹⁷ Note, *Freezing Out Minority Shareholders*, 41 VA. L. REV. 77 (1955).

using such statutes to force these minority shareholders to either take shares in the parent corporation or have their shares redeemed by the parent corporation. Even so, there are other ways to hinder this type of activity without the removal of this valuable procedure for quick mergers.⁴⁹⁸

The merger or consolidation of a domestic with a foreign corporation is basically the same as any other merger or consolidation under the pending Act.⁴⁹⁹ Likewise, the basic procedures for this type of merger or consolidation under the pending Act⁵⁰⁰ are substantially the same as under the present corporation statutes.⁵⁰¹ However, the fact that there are two different states involved does cause some problems.

The pending statute makes it clear that statutory authority to merge or consolidate with a corporation from another state must be found within the laws of both states. Additionally, the pending statute provides, as does the present Act, that the corporation formed in the case of a consolidation shall be organized under the laws of only one of these states. This provision clarifies a onetime troublesome area in some jurisdictions whereby a consolidated corporation was held to be the domestic corporation of two different states.⁵⁰² The consolidated corporation must officially adopt one state in which to be organized at the time of the consolidation. If the surviving corporation is to be a foreign corporation, it must qualify as a foreign corporation if it is to continue to transact business in this State. Additionally, the surviving corporation, if it is to be governed by the laws of any other state, must file with the Secretary of State a consent to service of process, it must irrevocably appoint the Secretary of State as agent to accept service, and it must file an agreement that it will promptly pay any

⁴⁹⁸ Indeed, if getting rid of certain minority shareholders were the only reason cited for merger, an action could be brought to prohibit the merger because the majority was failing in its fiduciary capacity with the minority. See H. HENN, *LAW OF CORPORATIONS* § 240 (2d ed. 1970). However, it should be noted that bad faith can be very difficult to prove. See *Matteson v. Ziebarth*, 40 Wash. 2d 286, 242 P.2d 1025 (1952). Additionally, there is considerable doubt as to whether West Virginia law would allow an injunction to halt a proposed merger or consolidation. See *Lebold v. Inland Steamship Co.*, 82 F.2d 351 (7th Cir. 1936) (applying West Virginia law).

⁴⁹⁹ See the text accompanying notes 470 & 471 *supra*.

⁵⁰⁰ Acts § 31-1-38.

⁵⁰¹ W. VA. CODE ANN. § 31-1-63a (1972 Replacement Volume).

⁵⁰² See Beale, *Corporations of Two States*, 4 COLUM. L. REV. 391 (1904); Annot., 27 A.L.R.2d 777 (1953).

amount to which dissenting shareholders of the domestic corporation may be entitled. These final provisions, although stringent, appear to be necessary for the protection of any dissenting shareholders in the domestic corporation.

In situations where the statutory provisions of both states are similar, there are no problems; however, where the statutes of each state are different, serious questions could arise. The pending Act resolves any possible problems by providing specifically that the domestic corporations must comply with domestic law and the foreign corporations must comply with foreign law in order to effect a merger or consolidation. Presumably the law of the surviving corporation would govern after the merger or consolidation is complete. The pending Act thus simplifies and clarifies the provisions concerning merger or consolidation of domestic and foreign corporations, even though the actual changes have not been significant.

An often-used alternative to statutory merger or consolidation is the sale or exchange of substantially all of the assets of one corporation to another.⁵⁰³ From the purchaser's standpoint, this is a much more desirable method for effecting a corporate combination, because the purchasing corporation can avoid the assumption of the debts, duties, and liabilities of the selling corporation.⁵⁰⁴ In addition, there are no statutory provisions requiring that the purchasing corporation must get shareholder approval for the purchase or must afford any dissenting shareholders an appraisal remedy.⁵⁰⁵

Under the pending corporate Act, the sale, lease, exchange, or other disposition of all or substantially all of the assets of a corporation, other than in the usual and regular course of business, requires a procedure similar to that required for other types of corporate combinations. Initially, the board of directors must adopt a resolution that recommends the sale or other disposition of assets and directs that the resolution be presented for approval at a special or annual meeting of shareholders.⁵⁰⁶ At the sharehold-

⁵⁰³ The sale of assets has been used to avoid the requirements of the dissent and appraisal statutes by the selling corporation. *See generally* Note, *The Right of Shareholders Dissenting From Corporate Combinations to Demand Cash Payment for Their Shares*, 72 HARV. L. REV. 1132 (1959).

⁵⁰⁴ *See* 107 U. PA. L. REV. 420, 421 (1959).

⁵⁰⁵ B. Fox, BUSINESS ORGANIZATIONS: CORPORATE ACQUISITIONS AND MERGER § 25.01[1] (1974).

⁵⁰⁶ Acts § 31-1-121(a).

ers' meeting,⁵⁰⁷ those shareholders holding a majority of the shares of the corporation must authorize the sale, lease, exchange, or other disposition of the assets, and the shareholders may, by majority vote, fix any terms and conditions on the transaction.⁵⁰⁸ Like the merger and consolidation procedure, the board of directors may in its discretion abandon the sale or other disposition of the assets.⁵⁰⁹

If the sale, lease, exchange, or other disposition of all or substantially all of the assets of the corporation is conducted in the usual and regular course of business, the pending Act only requires the approval of the board of directors.⁵¹⁰ The United States Supreme Court has held that "regular course of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."⁵¹¹ Thus it would seem that the articles of incorporation, taken with the prior custom of the corporation, would provide the definition.⁵¹²

The current West Virginia corporation statutes make no distinction between dispositions of assets within or without the regular course of business; in either case, the approval of the holders of sixty percent of the stock issued and outstanding is required.⁵¹³ Unlike the pending Act, the present Act also permits the sale, lease, or exchange of assets without a meeting of shareholders when approval is given by the written consent of the holders of sixty percent of the voting stock issued and outstanding.⁵¹⁴ This provision would allow a close corporation much more flexibility in this regard; however, the minority stockholders would not be able to adequately protest the transaction in order to protect his appraisal remedy if this provision were carried over to the pending Act.⁵¹⁵

⁵⁰⁷ Notice to all shareholders is specified in Acts § 31-1-121(b).

⁵⁰⁸ Acts § 31-1-121(c).

⁵⁰⁹ Acts § 31-1-121(d).

⁵¹⁰ Acts § 31-1-120.

⁵¹¹ *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943).

⁵¹² See *Hendren v. Neeper*, 279 Mo. 125, 213 S.W. 839 (1919); *In re Timmis*, 200 N.Y. 177, 93 N.E. 522 (1910); *Eisen v. Post*, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957).

⁵¹³ W. VA. CODE ANN. 31-1-64 (1972 Replacement Volume).

⁵¹⁴ *Id.* Under the predecessor to this section, the West Virginia Supreme Court of Appeals has held that the stockholders need not follow the technical requirements of the statute, but rather may sell the assets of the corporation without a shareholders meeting if the assent by all the shareholders is clearly and fairly expressed. *Kennedy v. Merchants & Miners Bank*, 67 W. Va. 475, 68 S.E. 32 (1910).

⁵¹⁵ See the text accompanying Acts §§ 31-1-122, -123, note 524, *infra*.

One of the most significant changes in the pending West Virginia corporate statutes is the right of shareholders to dissent from certain corporate actions⁵¹⁶ and to have their shares appraised and purchased by the corporation.⁵¹⁷ The appraisal remedy is designed to compensate the dissenting stockholder for the loss of his common law right to prevent the transaction,⁵¹⁸ while at the same time permitting the majority to proceed with an advantageous fundamental change.⁵¹⁹ Thus, the appraisal statute attempts to compromise a conflict between two divergent interests. On the one hand, there is a need for ease, flexibility, and swiftness when a change in the structure of the corporation is needed or desired, and, often-times, the financial life of a corporation may depend upon this freedom, unhampered by the convictions of a small minority.⁵²⁰ On the other hand, stockholders should have some opportunity to direct their investments in such a manner as to protect their interests, and they should not be forced to accept stock in a corporation which could be substantially different from that in which they had originally invested.⁵²¹ Despite the fact that the appraisal remedy in most respects serves both of these purposes admirably, this type of statute can become so burdensome to the corporation as to prohibit the merger or consolidation and at the same time so complicated to the individual shareholder as to work a forfeiture of his rights.

The statutory appraisal remedy granted to dissenting shareholders had its beginnings in *Lauman v. Lebanon Valley R.R.*, in which a Pennsylvania court held that a dissenting shareholder should not be forced into a new corporation, his stock taken from him, and the stock of another corporation imposed upon him by way of compensation.⁵²² From this early beginning, the appraisal remedy has been legislatively adopted and expanded by nearly all

⁵¹⁶ Acts § 31-1-122.

⁵¹⁷ Acts § 31-1-123.

⁵¹⁸ Cf. *Liggett v. Lee*, 288 U.S. 517, 558-61 (1933) (Brandeis, J., dissenting).

⁵¹⁹ Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROB. 307 (1958).

⁵²⁰ For a good discussion of all the things to be considered when merging or consolidating corporations, see A. CHOKA, *BUYING, SELLING, AND MERGING BUSINESSES* (3d ed. 1969).

⁵²¹ Cf. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420 (1930); Note, *The Right of Shareholders Dissenting From Corporate Combinations To Demand Cash Payment for Their Shares*, 72 HARV. L. REV. 1132 (1959).

⁵²² 30 Pa. 42, 48-49 (1858).

of the states in one form or another.⁵²³ Prior to the adoption of this Act, West Virginia was the only state that provided no appraisal remedy.

The pending statute provides the "right to dissent" to any plan of merger or consolidation and any sale or exchange of all the assets of the corporation not made in the usual course of business.⁵²⁴ In addition, the Act provides that a shareholder may dissent as to less than the total number of shares held in his name.⁵²⁵ The procedure for dissenting and having shares appraised and purchased by the corporation is spelled out explicitly in the pending Act, and the procedure must be followed strictly or the remedy will be lost.⁵²⁶

Initially, the shareholder must submit, no later than the meeting of the shareholders, a written objection to the proposed corporate action. If the proposal is adopted at the shareholders' meeting and if the dissenting shareholder has not voted in favor of the proposal, he must, within ten days following the meeting, make written demand on the corporation for payment of "fair value" for his shares.⁵²⁷ The pending Act is specific in providing that any stockholder who fails to make this demand within the ten day period "shall be bound by the terms of the proposed corporate action."⁵²⁸ In addition, once the demand has been made, it cannot be withdrawn unless the corporation consents to the withdrawal.⁵²⁹

Within the ten day period following the date on which the corporate action is effected, the corporation must give written notice to each dissenting shareholder and make a written offer to purchase his shares "at a specified price deemed by such corporation to be [the] fair value thereof."⁵³⁰ Along with the offer, the corporation must enclose its latest balance sheet and a profit and loss statement for the twelve month period ending at the date of the balance sheet.⁵³¹ If, within thirty days following the date the

⁵²³ McDonough, *The Appraisal Remedy for Dissenting Shareholders in Iowa and the DeFacto Merger Doctrine: Rath v. Rath Packing Company*, 16 DRAKE L. REV. 22 (1966).

⁵²⁴ Acts § 31-1-122.

⁵²⁵ *Id.*

⁵²⁶ See, e.g., *Zeeb v. Atlas Powder Co.*, 32 Del. Ch. 486, 87 A.2d 123 (Sup. 1952).

⁵²⁷ Acts § 31-1-123(a).

⁵²⁸ *Id.*

⁵²⁹ Acts § 31-1-123(b).

⁵³⁰ Acts § 31-1-123(c).

⁵³¹ *Id.*

corporate action is effected, the corporation and the shareholder agree on the "fair value" of the stock, surrender of the certificates and payment must be completed within ninety days from the date the corporate action was effected.⁵³² If the corporation and the dissenting stockholder cannot agree on a "fair value," the shareholder must, within sixty days from the date the corporate action was effected, make written demand on the corporation that a complaint be filed in a court of general civil jurisdiction so that the "fair value" of such shares may be determined.⁵³³ The corporation then has thirty days following the receipt of this written demand to institute the action, and if it fails to do so, any dissenting shareholder may institute the proceeding in the name of the corporation.⁵³⁴

There are several problems with the appraisal statute that are readily apparent, and some changes and clarifications appear to be necessary. First, since the mechanical procedures of the dissent and appraisal statutes are complicated and since the failure to comply with the statute can result in a forfeiture of the dissenter's rights under the statute, it would seem equitable to require the corporation to inform the shareholders, in the same letter explaining the merger, that they do have the right to dissent from the corporate action, to have their shares appraised, and to have their shares redeemed by the corporation. If this were done, all of the shareholders would be aware of the existence of a remedy and would be able to make an intelligent decision before voting on the proposed corporate action.

A second problem evident from the statute is the lack of guidance in the determination of "fair value."⁵³⁵ Valuation problems have become preeminent in appraisal situations, and there are many cases on this subject.⁵³⁶ Basically there are three methods used in valuing a corporation: (1) market value; (2) asset or liquidation value; and (3) investment value.⁵³⁷ Each of these methods has merits and each has drawbacks; primarily, however, each state

⁵³² Acts § 31-1-123(d).

⁵³³ Acts § 31-1-123(e).

⁵³⁴ *Id.*

⁵³⁵ "Fair value" is the language of the statute.

⁵³⁶ See Annot., 48 A.L.R.3d 430 (1973).

⁵³⁷ See Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453 (1966); Note, *Corporation Law—Dissenting Stockholder's Right of Appraisal—Determination of Value*, 28 N.Y.U.L. REV. 1021 (1953).

has been left to develop its own procedures for valuation through the courts. The appraisers which may be appointed by the court to hear evidence and recommend a "fair value" have much discretion in determining the "fair value" of the dissenters' shares, and the appellate courts are usually unwilling to change the values found by the trial court unless a clear showing of abuse of discretion can be shown.⁵³⁸ The Virginia Supreme Court has held that the term "fair value" or "fair cash value" means the "intrinsic worth . . . which is to be arrived at after an appraisal of all the elements of value."⁵³⁹ Among the elements considered by the Virginia courts in determining fair value are its market value, net asset value, investment value, and earning capacity.⁵⁴⁰ The Delaware courts require similar considerations and emphasize that the valuation is to be made of the business as a going concern, taking into consideration market value, asset value, dividends, earning prospects, the nature of the business, and any other facts which could be ascertained at the date of the merger.⁵⁴¹

A third problem that may arise from the appraisal statute is the question of exclusivity, that is, whether the appraisal remedy is the only remedy which the dissenting shareholders have available to them.⁵⁴² The statute itself gives no hint whether or not the appraisal remedy is exclusive, and there is conflicting authority whether the remedy is exclusive.⁵⁴³ On the one hand, states such as Virginia and Delaware have held that the appraisal remedy is exclusive, at least to the extent that the statute purports to cover the subject.⁵⁴⁴ On the other hand, Pennsylvania has held that the appraisal remedy is not exclusive when the statute itself does not make it so.⁵⁴⁵ All states, however, recognize that equitable relief other than appraisal is available in the case of fraud, illegality, oppression, or unfairness.⁵⁴⁶

⁵³⁸ *American Gen. Corp. v. Camp*, 171 Md. 629, 190 A. 225 (1937).

⁵³⁹ *Adams v. United States Distrib. Corp.*, 184 Va. 134, 146, 34 S.E.2d 244, 250 (1945), *cert. denied*, 327 U.S. 788 (1946).

⁵⁴⁰ *See, e.g., Lucas v. Pembroke Water Co.*, 205 Va. 84, 89, 135 S.E.2d 147, 150 (1964).

⁵⁴¹ *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71 (Sup. 1950).

⁵⁴² *See Wolf, Dissenting Shareholders: Is the Statutory Appraisal Remedy Exclusive?*, 42 Tex. L. Rev. 58 (1963).

⁵⁴³ *See* Annot. 174 A.L.R. 960, 968 (1948); Annot. 162 A.L.R. 1237, 1250 (1946); Annot. 87 A.L.R. 597, 603 (1933).

⁵⁴⁴ *Adams v. United States Distrib. Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945); *Meade v. Pacific Gamble Robinson Co.*, 29 Del. Ch. 406, 51 A.2d 313 (Ch. 1947).

⁵⁴⁵ *Barnett v. Philadelphia Market Co.*, 218 Pa. 649, 67 A. 912 (1907).

⁵⁴⁶ *See, e.g., Craddock-Terry Co. v. Powell*, 181 Va. 417, 25 S.E.2d 363 (1943);

The pending Act provides specifically for the merger,⁵⁴⁷ consolidation,⁵⁴⁸ and sale of assets⁵⁴⁹ of nonprofit corporations. The present Act has no express provisions in this area for nonprofit corporations; at best, it is doubtful under the present Act if these procedures are possible for nonprofit corporations at all.⁵⁵⁰ The actual mechanical procedures for the merger, consolidation, or sale of assets of nonprofit corporations under the pending Act are substantially identical to those applying to business corporations. The only differences are those needed to be consistent with the peculiarities of nonprofit corporations.⁵⁵¹

Similarly, members of nonprofit corporations have the rights of dissent, appraisal, and redemption under the pending Act.⁵⁵² There is no such provision under present corporate law. The procedures for dissent, appraisal, and redemption applying to nonprofit corporations are identical to those which apply to business corporations; reference for the actual procedure is made to that section dealing with business corporations.⁵⁵³ Even though the provisions dealing with merger, consolidation, and sale of assets of nonprofit corporations are nearly identical to the same provisions for business corporations, it is much preferable to the present code which leaves those provisions to speculation and uncertainty.

G. Duties of the Secretary of State

1. *Attorney in Fact*

The pending West Virginia Corporation Act contains a "long-arm statute" nearly identical to that contained in the present corporation Act.⁵⁵⁴ The only significant difference between the two

Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 32 A.2d 148 (Ch. 1943); Homer v. Crown Cork & Seal Co., 155 Md. 66, 141 A. 425 (1928).

⁵⁴⁷ Acts §§ 31-1-150, -151.

⁵⁴⁸ *Id.*

⁵⁴⁹ Acts § 31-1-152.

⁵⁵⁰ W. VA. CODE ANN. § 31-1-63 (1972 Replacement Volume). This section provides that "[a]ny two or more corporations organized under the provisions of this chapter . . . for the purpose of carrying on *any kind* of business, may consolidate or merge . . ." (emphasis added).

⁵⁵¹ For example, the section dealing with the approval of a merger or consolidation provides, in part, that when the "merging or consolidating corporation has no members, or no members entitled to vote thereon, a plan of merger or consolidation shall be adopted at a meeting of the board of directors . . ." Acts § 31-1-150(b).

⁵⁵² Acts § 31-1-153.

⁵⁵³ *Id.*

⁵⁵⁴ Acts § 31-1-15; W. VA. CODE ANN. § 31-1-71 (1972 Replacement Volume).

statutory provisions is that the Secretary of State replaces the Auditor as the attorney in fact in West Virginia for all corporations, whether domestic or foreign. Under the current Act, the Secretary of State is constituted the attorney in fact authorized to accept service of process on behalf of every corporation only when it is the duty of the Auditor to collect license taxes or any other debts or claims due the State from corporate entities. With respect to the current statutory provision, the powers, the authority, and the residence of the Auditor are state-wide in his capacity as attorney in fact for all foreign corporations.⁵⁵⁵ Presumably this rule would also apply under the pending Act with respect to the Secretary of State's power as attorney in fact.

The Model Business Corporation Act, which is the model for many state statutes⁵⁵⁶ concerning the service of process on corporations, provides for the secretary of state to be the foreign corporation's agent for service of process under three circumstances: (1) when the qualified foreign corporation fails to appoint or maintain a registered agent; (2) if the registered agent cannot be found with reasonable diligence at the corporation's registered office; or (3) if the certificate of authority of a foreign corporation is suspended or revoked. The language as drafted in the model statute seems to prescribe that the secretary of state can be served with process only if one of these conditions precedent is found.⁵⁵⁷ Neither the current nor the pending West Virginia statutory provisions contain any of these conditions precedent.

Both the current Act and the pending Act automatically designate the appropriate state official as attorney in fact on behalf of every foreign corporation authorized to conduct affairs or to transact business within the State. Both provisions also provide that any unauthorized foreign corporation which transacts business within West Virginia is conclusively presumed to have appointed the state official (either the Auditor or the Secretary of State) as its attorney in fact with authority to accept service of process on its behalf without the necessity of any act by the corpo-

⁵⁵⁵ *DeBoard v. Perini & Sons, Inc.*, 140 W. Va. 833, 836, 87 S.E.2d 462, 464 (1955).

⁵⁵⁶ Twenty-two states plus the District of Columbia have statutes comparable to section 115 of the Model Business Corporation Act; a substantial minority of the jurisdictions have comparable provisions. See 2 MODEL BUS. CORP. ACT ANN. § 115, ¶ 3.01-.02 (2d ed. 1971).

⁵⁵⁷ 2 MODEL BUS. CORP. ACT ANN. § 115, ¶ 2 (2d ed. 1971).

ration appointing the state official as such attorney in fact.⁵⁵⁸

The practical consequence of these particular statutory provisions is to avoid situations where a foreign corporation may transact business within the State or commit torts against the residents of West Virginia and, by failure to maintain an agent within the State, escape from the jurisdiction of the State's courts. Thus the injured citizen is not without a practical redress for the grievances committed against him by the foreign corporation. This consequence is emphasized by the long-arm provisions of both the present and pending Acts which enumerate three specific acts of an unauthorized foreign corporation that will constitute conducting affairs or transacting business within the meaning of the statute.⁵⁵⁹ The commission of any of these three acts is deemed to be an agreement of the foreign corporation that any notice or service of process accepted by the Secretary of State is of the same legal force and validity as process served upon the corporation while the foreign corporation is within the physical boundaries of West Virginia.

As early as 1856 the United States Supreme Court held that a state can constitutionally impose conditions on a corporation's ability to transact business within its territorial boundaries.⁵⁶⁰ The

⁵⁵⁸ Acts § 31-1-15; W. VA. CODE ANN. § 31-1-71 (1972 Replacement Volume).

⁵⁵⁹ The long-arm provisions of both the current and pending statutes are identical. The statutes provide that:

a foreign corporation not authorized to conduct affairs or do or transact business in this state pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this state, (b) if such corporation commits a tort in whole or in part in this state, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this state notwithstanding the fact that such corporation had no agents, servants, or employees or contacts within this state at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state [auditor in present act] pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture or sale, offer of sale or supply of such defective product shall be of the same legal force and validity as process duly served on such corporation in this state.

Acts § 31-1-15.

⁵⁶⁰ *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855).

Court went on to state that it was a reasonable condition for a statute to provide that an agent acting for a corporation was deemed to be empowered to accept service of process on behalf of the corporation authorized to transact business within the state.⁵⁶¹

International Shoe Co. v. Washington held that a state statute permitting service on a foreign corporation by serving a state official is constitutional if the foreign corporation is doing business in the state or has certain "minimum contacts" with the state so that the maintenance of a lawsuit does not offend traditional notions of justice and fair play.⁵⁶² With respect to the "minimum contacts" rule, the requirement of maintaining traditional notions of justice and fair play is nebulous at best. There are no generalized standards that can be applied to determine whether a foreign corporation has had sufficient minimum contacts with the forum state so that it can be subjected to suit there. The material factor is the quality and nature of the corporate activity, rather than the quantity of the activity.⁵⁶³

In *State ex rel. Coral Pools, Inc. v. Knapp*, the West Virginia Supreme Court of Appeals closely followed the *International Shoe* rule in holding that for a state to satisfy jurisdictional due process, a foreign corporation must have such minimum contacts with the forum state so that the corporation's defense in the forum state is consistent with traditional notions of substantial justice and fair play.⁵⁶⁴ The court went on to add that those activities carried on or transacted by a foreign corporation in the forum state in order to satisfy territorial due process requirements must be determined according to the facts and circumstances of each case.⁵⁶⁵ These holdings were later reiterated by the West Virginia court in *Hodge v. Sands Manufacturing Co.*⁵⁶⁶

Both the United States Supreme Court and the West Virginia Supreme Court of Appeals have noted a clearly discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations.⁵⁶⁷ Several important factors which have contributed to this liberal nationwide trend are the growing amount

⁵⁶¹ *Id.* at 407.

⁵⁶² 326 U.S. 310, 316 (1945).

⁵⁶³ Annot., 24 A.L.R.3d 532 (1969).

⁵⁶⁴ 147 W. Va. 704, 713, 131 S.E.2d 81, 87 (1963).

⁵⁶⁵ *Id.* at 718, 131 S.E.2d at 90.

⁵⁶⁶ 151 W. Va. 133, 150 S.E.2d 793 (1966).

⁵⁶⁷ *McGhee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957); *State ex rel. Coral Pools Inc. v. Knapp*, 147 W. Va. 704, 718, 131 S.E.2d 81, 90 (1963).

of business conducted across state lines and the advances in transportation and communication that have made it less burdensome for a party sued to defend himself in a state where he engaged in economic activity.⁵⁶⁸ To these factors which consider the nature and size of the manufacturer's business and its probability of engaging in interstate commerce can be added several other factors that touch upon the socio-economic status of the aggrieved person and the nature of the cause of action. In *Philipps v. Anchor Hocking Glass*, the Arizona court stated that a trial court, in determining whether it is fair to exercise jurisdiction over a non-resident corporation, should consider the economic independence of the plaintiff.⁵⁶⁹ Due to the immobility of the lower economic class, a poor man may be unable to afford a trip to another jurisdiction where he can institute the suit. Thus if his injuries go uncompensated, he is likely to become a public ward upon the state. The Arizona court added that in considering the nature of the cause of action, the practical matters of trial should be taken into consideration.⁵⁷⁰ "As the number of local witnesses increases and their availability to travel decreases, it seems fairer to make the manufacturer defend in the plaintiff's forum."⁵⁷¹ These factors are not exclusive, and all relevant matters should be considered by the trial court in making its determination.

The United States Supreme Court extended the *International Shoe* doctrine in *McGhee v. International Life Insurance Co.*⁵⁷² The Court there held that a state's assertion of jurisdiction over a foreign corporation on the basis of a single or isolated transaction does not violate the due process clause of the fourteenth amendment.⁵⁷³ Based on the facts that the insurance contract was delivered in the state, the premiums were mailed from the state, and the insured was a resident of the state when he died, the Court stated that the insurance contract had a "substantial connection" with the forum state and in personam jurisdiction was properly asserted on the basis of this single transaction, even though the insurance company had never solicited or previously transacted insurance business within the state.⁵⁷⁴

⁵⁶⁸ 355 U.S. at 223.

⁵⁶⁹ 100 Ariz. 251, 260, 413 P.2d 732, 738 (1966).

⁵⁷⁰ *Id.* at 260, 413 P.2d at 738.

⁵⁷¹ *Id.*

⁵⁷² 355 U.S. 220 (1957).

⁵⁷³ *Id.* at 223.

⁵⁷⁴ *Id.*

With respect to contractual liability predicated upon the long-arm provisions,⁵⁷⁵ the West Virginia court, in the *Knapp* decision, upheld service of process on an unqualified foreign corporation on the basis that the contract into which the corporation entered was to be performed within the State and had a substantial connection with the State.⁵⁷⁶ The *Knapp* decision closely parallels that of *McGhee* in that it stands for the proposition that under the proper circumstances, jurisdiction over a foreign corporation can emanate from a single contract which has a "substantial connection" with the forum state. This is in accord with the general rule throughout the country.⁵⁷⁷

The West Virginia Supreme Court of Appeals denied the jurisdiction of a circuit court to entertain an action predicated on the "tort" provision of the long-arm statute in the decision of *Hodge v. Sands Manufacturing Co.*⁵⁷⁸ The jurisdiction was denied solely on due process grounds; there were none of the necessary minimum contacts between the foreign corporation and the State. The minimum contacts were found lacking because neither of the Ohio corporations involved had representatives, had transacted business, had owned property, had entered into a contract to be performed, had maintained a business office, or had been authorized to do business in West Virginia.⁵⁷⁹

⁵⁷⁵ See note 559 *supra*.

⁵⁷⁶ 147 W. Va. at 718, 131 S.E.2d at 90.

⁵⁷⁷ See Annot., 23 A.L.R.3d 551 (1969).

⁵⁷⁸ 151 W. Va. 133, 150 S.E.2d 793 (1966).

⁵⁷⁹ Two West Virginia federal district court decisions were determined on the crucial factor of whether minimum contacts were established between the foreign corporation and the State. In *Harford v. Smith*, 257 F. Supp. 578 (N.D.W. Va. 1966), a bottled gas stove exploded at a motel in which the plaintiffs were spending the night. The gas stove was purchased within the State by the motel owners. The foreign corporation admitted to advertising and soliciting business in West Virginia, and the corporation also engaged in direct mail contact with West Virginia residents. These facts were held to constitute the necessary minimum contacts that gave the court in personam jurisdiction over the corporation when service of process was effectuated pursuant to the long-arm statute. *Id.* at 582. In *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (N.D.W. Va. 1962), a personal injury resulted from the use of a defective pipe in West Virginia. The corporation was not a West Virginia corporation, nor did it own property within the State. The pipe was manufactured in Texas and was later sold to a gas company located within this State. The record was silent with respect to whether the defective pipe was purchased in West Virginia or whether it was purchased outside the State and then transported into and installed in the State. There was no indication of an advertising campaign or of any direct mail contact with residents of the State by the foreign corporation. No agents of the corporation had ever been inside the physical boundaries of the State. Upon

West Virginia is in the minority among the nation's jurisdictions since it requires the appointment of a state official to accept service of process on behalf of the corporation, whether domestic or foreign. Most jurisdictions throughout the country require the appointment of a "resident agent" to accept service of process for the corporation.⁵⁸⁰ The appointment of the "resident agent" is usually made either in the articles of incorporation or some other separate document.

Thus there will be little change in the present law with respect to the West Virginia long-arm statute as re-enacted in the pending corporation laws. The only change is that the Secretary of State rather than the Auditor will be the attorney in fact for all corporations and will have the authority to accept service of process and notice on behalf of every corporation.

2. *Other Duties of the Secretary of State*

Besides designating the Secretary of State as attorney in fact for all corporations, the pending Act also codifies certain other duties of the Secretary. Under the pending Act, the Secretary of State is granted broad administrative power and authority to execute, implement, and perform the duties imposed upon him by the West Virginia Corporation Act.⁵⁸¹ The purpose of this provision is to negate any strict judicial interpretation of the powers of the Secretary of State, which might hinder the performance of his duties under the pending Act.⁵⁸² Unlike the Model Business Corporation Act,⁵⁸³ the pending Act gives the Secretary of State authority to issue rules and regulations in accordance with the West Virginia

these facts, the court held that the necessary minimal contacts required for jurisdictional due process were not established and that the foreign corporation was not amenable to the substituted service of process which would have enabled the district court to render a personal judgment against the foreign corporation. *Id.* at 576. The court in *Mann* reasoned that in addition to the commission of a tort within the State, it is necessary under the due process clause of the fourteenth amendment that minimum contacts exist between the foreign corporation and the forum state. *Id.* at 574-76. Thus the tort provision of the long-arm statute was held not to apply to a situation where the operative facts occurred outside the State and only the injurious effect occurred within the State.

⁵⁸⁰ 2 MODEL BUS. CORP. ACT ANN. § 115, ¶ 3.01-.02 (2d ed. 1971).

⁵⁸¹ Acts § 31-1-67.

⁵⁸² 2 MODEL BUS. CORP. ACT ANN. § 139 (2d ed. 1971).

⁵⁸³ *Id.* The Model Business Corporation Act, section 139, is identical with Acts § 31-1-67, except for the addition of the second paragraph concerning the promulgation of rules and regulations in the West Virginia Act.

⁵⁸⁴ W. VA. CODE ANN. §§ 29A-1-1 to -7-4 (1971 Replacement Volume).

Administrative Procedures Act.⁵⁸⁴

Under the current West Virginia corporation law, if a corporation complies with the statutory provisions dealing with incorporation, amendment, merger, dissolution, and other matters, the Secretary of State must approve such corporate action and issue the appropriate certificate.⁵⁸⁵ If the Secretary of State neglects, fails, or refuses to comply with his statutory duties, the corporation is usually forced to bring a civil action or writ of mandamus against him. The pending Act establishes, for the first time, a statutory right to appeal and specific procedures for judicial review by a person or corporation aggrieved by a ruling, disapproval, or decision of the Secretary of State that appears arbitrary, discriminatory, or contrary to law.⁵⁸⁶

If the Secretary of State fails to approve any corporate document or fails to issue a certificate, he must give written notice of his ruling, disapproval, or decision to the person or corporation particularizing the reasons therefor. The Secretary of State must give this notice by registered mail to the principal place of business of the corporation within ten days after the receipt of the document.⁵⁸⁷ Following receipt of the written notice from the Secretary of State, the corporation may appeal the Secretary's decision to the circuit court in the county where its principal office is located or in the circuit court of Kanawha County if the principal office is located outside the State. The appeal must be taken within thirty days following receipt of the notice, and it must be by petition for writ of certiorari. Any final order or judgment by the circuit court may be appealed by the person or corporation to the West Virginia Supreme Court of Appeals.⁵⁸⁸

⁵⁸⁵ See W. VA. CODE ANN. § 31-1-7 (1972 Replacement Volume) (issuance of certificate of incorporation); *Id.* § 31-1-12 (certificate of amendment of charter); *Id.* §§ 31-1-63, -63a, -63al (merger or consolidation); *Id.* § 31-1-79 (authority to do business); *Id.* § 31-1-80 (voluntary dissolution); *Id.* § 31-1-82a (certificate of expiration); *Id.* § 31-1-84 (certificate of withdrawal). These statutory provisions will be replaced under the pending Act by Acts § 31-1-28 (issuance of certificate of incorporation); Acts § 31-1-31 (certificate of articles of incorporation); Acts § 31-1-33 (re-stated certificate of incorporation); Acts §§ 31-1-36, -58 (merger or consolidation); Acts § 31-1-40 (certificate of dissolution), Acts §§ 31-1-51, -53, -54, -55 (certificate of authority); Acts § 31-1-57 (certificate of amendment to articles of incorporation); Acts § 31-1-60 (certificate of withdrawal); Acts § 31-1-64 (certificate of expiration of corporate existence).

⁵⁸⁶ Acts § 31-1-68. This section corresponds with section 140 of the Model Business Corporation Act. See 2 MODEL BUS. CORP. ACT ANN. § 140 (2d ed. 1971).

⁵⁸⁷ Acts § 31-1-68(a).

⁵⁸⁸ Acts § 31-1-68(b).

The pending Act requires the Secretary of State to furnish certain forms.⁵⁸⁹ Where reports are required to be filed in the office of the Secretary of State, the Secretary must dispense such forms to the person or corporation. Forms for all other documents to be filed with the Secretary of State must be furnished on request. The pending Act changes current law not only by requiring the Secretary to furnish certain forms but also by stipulating that the forms prescribed and provided by the Secretary must be used.⁵⁹⁰ This provision undoubtably will create uniformity; however, by requiring that all reports be made on standardized forms, some flexibility will be lost.

Various provisions of the pending Act require that the Secretary of State both issue certain certificates and certify certain documents filed in his office.⁵⁹¹ All such certificates and certified copies of documents shall be admissible in all courts, public bodies, and official bodies as prima facie evidence of the facts contained therein.⁵⁹² In addition, the pending Act provides that a certificate by the Secretary of State as to the existence or nonexistence of facts relating to corporations shall also be received in all courts, public bodies, and official bodies as prima facie evidence of the existence and nonexistence of facts stated therein.

Only three sections of the current corporation law mention the admissibility of certificates or certified copies of documents as evidence.⁵⁹³ This provision injects clarity and uniformity into the law and allows for the inclusive admissibility, as prima facie evidence, of all certified copies of documents and certificates of the Secretary of State. The provision for a certificate by the Secretary as to the existence or nonexistence of facts relating to a corporation marks a new departure in an attempt to eliminate obscurity in the law and to provide a clear and reasonable set of corporate rules.

H. Definitions and Miscellaneous Provisions

1. Definitions

Definitions have always been useful to the practitioner and

⁵⁸⁹ Acts § 31-1-70.

⁵⁹⁰ The current Act has no provision similar to Acts § 31-1-70. By custom, the Secretary of State presently provides sample forms on request.

⁵⁹¹ Acts § 31-1-69. This section is identical to section 141 of the Model Business Corporation Act. See 2 MODEL BUS. CORP. ACT ANN. § 141 (2d ed. 1971).

⁵⁹² Acts § 31-1-69. See 2 MODEL BUS. CORP. ACT ANN. § 141, ¶ 2 (2d ed. 1971).

⁵⁹³ W. VA. CODE ANN. § 31-1-7 (1972 Replacement Volume) (certificates of

have aided him in identifying, confronting, and relating to various corporate problems. The definitions set forth in the pending Act present, with an economy of language, those terms most important, most frequently used, that require the greatest certainty of meaning, and that require some additional explanation.⁵⁹⁴

The "articles of incorporation"⁵⁹⁵ refer to the instrument by which a corporation is formed and organized under the general corporation laws.⁵⁹⁶ The definition includes the original articles, restated articles, and amendments thereto.

"Capital surplus" and "earned surplus"⁵⁹⁷ are two terms that can be considered simultaneously. "Capital surplus," also known as capital in excess, is the entire surplus of a business corporation other than its earned surplus. Such a surplus results from the increase of capital through such things as the sale of treasury stock in excess of cost, the issuance of common stock in excess of par value or stated value, or capital contributed other than for shares.⁵⁹⁸ The definition of "earned surplus" is both lengthy and complex and may pose problems to the practitioner. Stated more simply, "earned surplus" is the gross earnings of a corporation less its dividends and losses from a given starting point, usually the date of incorporation.⁵⁹⁹ "Earned surplus" is thus equivalent to the net earnings retained in the business. Because the word surplus connotes an excess amount or residue, the American Institute of

incorporation); *Id.* § 31-1-12 (certificates of amendment of charter); *Id.* § 31-1-63 (agreements of merger or consolidation).

⁵⁹⁴ Acts § 31-1-6. Because of the breadth and quantity of the definitions listed in the pending Act, this analysis will be limited to those definitions that require some additional explanation. For a complete discussion of this entire section, see 1 MODEL BUS. CORP. ACT ANN. § 2 (2d ed. 1971). *See also* 70 HARV. L. REV. 1357 (1957). Definitions under present West Virginia general corporation law are contained in W. VA. CODE ANN. § 31-1-1 (1972 Replacement Volume).

⁵⁹⁵ Acts § 31-1-6(a).

⁵⁹⁶ BLACK'S LAW DICTIONARY 144 (rev. 4th ed. 1968). VA. CODE ANN. § 13.1-2(e) (1973 Replacement Volume) defines "articles of incorporation" as all documents constituting, at any particular time, the charter of a corporation. *See* W. VA. CODE ANN. § 31-1-1 (1972 Replacement Volume) for the definition of "charter" under present practice.

⁵⁹⁷ Acts § 31-1-6(e), -6(h).

⁵⁹⁸ AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, 2 APB ACCOUNTING PRINCIPLES 9515-16 (1968). *See also* Acts § 31-1-100.

⁵⁹⁹ When stock dividends are declared, the market value of the stock is capitalized to "earned surplus" and the difference between the par or stated value and the market value is credited against "capital surplus."

Certified Public Accountants has disregarded the term, using instead "retained earnings."⁶⁰⁰

"Earned surplus" may be created through what is known as quasi-reorganization, a transaction in which a corporation eliminates an earned surplus deficit by reducing capital and crediting the amount of the reduction to surplus; it may or may not revalue its assets at that time.⁶⁰¹ "Earned surplus" is used in determining other statutory rights, such as the right of a corporation to purchase its own shares⁶⁰² and the right of a board of directors to declare dividends payable in cash or property.⁶⁰³ The board may also transfer earned surplus to stated capital or to capital surplus.⁶⁰⁴

The definition of "employee" is significant as it includes corporate officers but not directors, unless a director is also an officer.⁶⁰⁵ Under the pending Act, a corporation has the power to lend money and use its credit to assist its employees⁶⁰⁶ if such loan or assistance may benefit the corporation. Thus, loans to directors may be ultra vires without authorization by the shareholders.⁶⁰⁷

"Net assets," "stated capital," and "surplus" are interrelated terms that will be considered together. "Surplus" is defined as the excess of the net assets over stated capital.⁶⁰⁸ This surplus arises from the operation of the business, representing total net profits, income, and gains and losses—earned surplus—or from certain capital transactions, such as stock subscriptions at a price above par value—capital surplus.⁶⁰⁹ "Net assets" equal the amount by which the total corporate assets exceed the total liabilities.⁶¹⁰ There is no attempt to prescribe how the assets are to be valued or how

⁶⁰⁰ APB ACCOUNTING PRINCIPLES, *supra* note 598; G. JOHNSON & J. GENTRY, FINNEY AND MILLER'S PRINCIPLES OF ACCOUNTING 522 (7th ed. 1974). Related to "earned surplus" or "retained earnings" is the concept of "pooling of interests." This allows the earned surplus of a corporation whose assets have been acquired by another corporation to be carried forward. See Gibson and Freeman, *A Decade of the Model Business Corporation Act in Virginia*, 53 VA. L. REV. 1396, 1402 (1967).

⁶⁰¹ 1 MODEL BUS. CORP. ACT ANN. § 2(1), ¶ 2 (2d ed. 1971).

⁶⁰² Acts §§ 31-1-8(d), -83.

⁶⁰³ Acts § 31-1-99.

⁶⁰⁴ Acts § 31-1-116.

⁶⁰⁵ Acts § 31-1-6(i).

⁶⁰⁶ Acts § 31-1-8(f).

⁶⁰⁷ Acts § 31-1-101.

⁶⁰⁸ Acts § 31-1-6(s).

⁶⁰⁹ 1 MODEL BUS. CORP. ACT ANN. § 2(k), ¶ 2 (2d ed. 1971).

⁶¹⁰ Acts § 31-1-6(m).

the debts of the corporation are to be determined. These decisions are left to the board of directors, who may be personally liable for error.⁶¹¹ "Stated capital" is a stipulated amount of stockholders' equity.⁶¹² To protect creditors, the law gives assurance that a corporation will not be permitted to make payments or distribution to its stockholders below the "stated capital."⁶¹³ The need for this was amplified by the creation of no-par shares which required an allocation of at least some part of the consideration to the capital account. "Stated capital" consists of the aggregate par value of all par value shares issued and, where no-par shares are involved, the total consideration received for the shares issued or an amount based on a stated value per share.⁶¹⁴ The stated capital can be reduced, but only in compliance with the applicable statutory provisions.⁶¹⁵

The units into which the proprietary interests in a corporation are divided are designated as "shares."⁶¹⁶ The word "proprietary" does not necessarily refer to shares representing some economic interest in the property or assets of a corporation. Thus, shareholders may be entitled to vote by their possession of "shares," but they may be prevented from receiving dividends on liquidation or otherwise.⁶¹⁷

"Treasury shares" are a corporation's own shares which: (1) have been issued by the corporation, (2) have been reacquired by that corporation, and (3) have not been cancelled or retired.⁶¹⁸ These shares are issued, but, during the entire time the corporation is considering their eventual disposition, they are not outstanding. The shares may be reacquired by the corporation by donation, by purchase, or in settlement of a debt.⁶¹⁹

⁶¹¹ 1 MODEL BUS. CORP. ACT ANN. § 2(i), ¶ 2 (2d ed. 1971). See Acts § 31-1-102.

⁶¹² Acts § 31-1-6(q).

⁶¹³ However, such legal provisions regulating stated capital do not eliminate the risk of loss by creditors. Stated capital may be impaired by unprofitable operations, and assets of the corporation may have been pledged as security for specific obligations, thereby making such assets unavailable to satisfy the claims of other creditors. G. JOHNSON & J. GENTRY, FINNEY AND MILLER'S PRINCIPLES OF ACCOUNTING 485 (7th ed. 1974).

⁶¹⁴ *Id.* at 484-85; 1 MODEL BUS. CORP. ACT ANN. § 2(j), ¶ 2 (2d ed. 1971). See also Acts § 31-1-85.

⁶¹⁵ See Acts § 31-1-115.

⁶¹⁶ Acts § 31-1-6(p).

⁶¹⁷ See *Stroh v. Blackhawk Holding Corp.*, 48 Ill. 2d 471, 272 N.E.2d 1 (1971); 85 HARV. L. REV. 1676 (1972).

⁶¹⁸ Acts § 31-1-6(t).

⁶¹⁹ 1 MODEL BUS. CORP. ACT ANN. § 2(h), ¶ 2 (2d ed. 1971); G. JOHNSON & J.

2. Books and Records

Vital to a corporation's existence is the proper documentation of its actions upon its books and records. Equally vital to the shareholders and directors is their right to inspect such books and records. The pending Act expressly gives such right to the shareholders and directors.⁶²⁰ The primary effect of the pending Act will be to allow individual shareholders the right to inspect corporate books and records.⁶²¹ The current Act allows inspection only by directors or committees appointed by the shareholders.⁶²² The pending Act allows any shareholder who has been the owner of record for at least six months or who owns five percent of the outstanding shares to inspect the relevant⁶²³ books and records of the corporation upon presentation of a written demand showing a proper purpose.⁶²⁴ This change is desirable in that it provides the individual shareholder with a method of ascertaining whether his investment is secure. The pending Act also permits a court of competent jurisdiction to compel production of records even though the shareholder has not complied with the time or amount requirements. Of course, the shareholder must show a proper purpose to the court before he can see the records.

GENTRY, FINNEY AND MILLER'S PRINCIPLES OF ACCOUNTING 537-38 (7th ed. 1974). For a further definition of treasury shares, see *State ex rel. Weede v. Bechtel*, 224 Iowa 785, 56 N.W.2d 173 (1953); accord *Kemp v. Levinger*, 162 Va. 685, 174 S.E. 820 (1934).

⁶²⁰ Acts § 31-1-105. This section is identical to section fifty-two of the Model Business Corporation Act.

⁶²¹ At common law a stockholder was entitled to inspect the books and records of the corporation at reasonable times for reasonable purposes. *State ex rel. Woodward v. Black Betsey Consol. Coal Co.*, 102 W. Va. 659, 136 S.E. 182 (1926). In *Albee v. Lamson & Hubbard Corp.*, 320 Mass. 421, 69 N.E.2d 811 (1946), it was stated that the right of inspection was based on the shareholder's beneficial ownership of the corporation's assets and his right to know the financial condition of the corporation and how it was being managed by the officers to which the assets were entrusted. But this right to inspect was often hampered by the corporation's refusal to allow it, and the litigation required to enforce the right was often costly to both the shareholder and the corporation. Statutory efforts to create an absolute right to inspection have been weakened by the courts. See, e.g., *Foster v. White*, 86 Ala. 467, 6 So. 88 (1889).

⁶²² W. VA. CODE ANN. § 31-1-74 (1972 Replacement Volume). A possible reading of this section would give the holders of at least one-tenth of the stock outstanding a right to inspect the books and records. But cases interpreting this provision seem to negate such an interpretation. E.g., *Daurelle v. Traders Fed. Sav. & Loan Ass'n*, 143 W. Va. 674, 104 S.E.2d 320 (1958).

⁶²³ The word "relevant" is inserted to decrease the possibility of expensive and vexacious searches.

⁶²⁴ See text accompanying notes 630 to 642 *infra*.

The absence of a provision in the pending Act allowing the books or records to be inspected by directors, officers, or committees raises the question of whether they are to be denied this right. To answer the question in the affirmative would be inconsistent with corporate functioning. Officers and directors are charged with running the corporation's activities, and to do so without reference to the records would not be feasible. The West Virginia court has recognized the right,⁶²⁵ and there seems to be no reason to remove this right of inspection from the pending Act.

Another important difference between the current and pending Acts is the addition to the latter of a penalty against the officer or agent of the corporation who refuses to allow the inspection after a proper purpose has been shown.⁶²⁶ This penalty provision should result in greater freedom of access to corporate books and records, because in borderline cases, the corporate official will, more than likely, allow inspection rather than incur the penalty.⁶²⁷ Such action will also save both the corporation and the shareholder the time and costs of litigation.

The pending provisions do not mention the preparation of an annual report by the president of the corporation to which the shareholders have easy, unencumbered access.⁶²⁸ Instead, provisions for mailing to any shareholder, upon his written request, the most recent financial statement in detail are included. Although this new arrangement may not provide the type and amount of information that the president's annual statement did, the availability of inspection under the pending Act would compensate for this loss.

Another difference between the current and pending Acts is

⁶²⁵ *State ex rel. Keller v. Grymes*, 65 W. Va. 451, 64 S.E. 728 (1909). The director's right of inspection is, in most jurisdictions, absolute as long as he is loyal and not hostile, and his purpose is not in derogation to the interest of the corporation. See, e.g., *State ex rel. Farber v. Seiberling Rubber Co.* 53 Del. 295, 168 A.2d 310 (1961). A favorable reading of *Grymes*, would imply this to be true in West Virginia.

⁶²⁶ Some sources feel that the primary purpose of inspection legislation is to prescribe penalties, such as the one in section 105, so to make it unlikely that reasonable requests for inspection will be refused. 2 MODEL BUS. CORP. ACT ANN. § 52, ¶ 2 (2d ed. 1971).

⁶²⁷ The penalty provided in the pending Act, ten percent of the value of shares owned by the shareholder, has been held not to be a taking of property without due process of law. *Smith v. Flynn*, 275 Ala. 392, 155 So. 2d 497 (1963).

⁶²⁸ Such a report was required by W. VA. CODE ANN. § 31-1-74 (1972 Replacement Volume).

that the latter is more specific as to what books and records need be kept and the manner in which and the place at which they must be kept. The phrase, "in any other form capable of being converted into written form within a reasonable time,"⁶²⁹ takes into account that many corporations keep many records in forms such as microfilm or computer banks.

The "proper purpose" requirement is the phrase that is the focus of most litigation in the section concerning inspection of books and records. This requirement evolved from the conflict of interest that often arose between the shareholder seeking to inspect and the other shareholders and the corporation.⁶³⁰ Legislators generally have left the question of what is a proper purpose to the balancing technique of the judicial process.⁶³¹ In those instances in which the legislature has tried to do away with the proper purpose requirement, the courts have found an implied purpose even though the right to inspect was absolute,⁶³² or there was no requirement at all.⁶³³ The "proper purpose" test has been met when the inspection was to determine the value of shares of stock,⁶³⁴ to communicate with other shareholders,⁶³⁵ or to ascertain possible mismanagement.⁶³⁶ Inspection has been denied if the purpose was to gain a benefit for a competitor,⁶³⁷ for curiosity or speculation,⁶³⁸ or for harassment of the corporation.⁶³⁹

⁶²⁹ Acts § 31-1-105.

⁶³⁰ A shareholder normally would not wish to inspect the books and records unless he felt that he was being deprived of some right or benefit due him. His dissatisfaction would usually be with the corporation or majority shareholders. Hence, the conflict of interest exists.

⁶³¹ 2 MODEL BUS. CORP. ACT ANN. § 52, ¶ 2 (2d ed. 1971).

⁶³² *Foster v. White*, 86 Ala. 467, 6 So. 88 (1889). The court stated that the corporation must show an improper purpose to deny inspection.

⁶³³ *Tate v. Sanotone Corp.*, 272 App. Div. 103, 69 N.Y.S.2d 535 (1st Dep't 1947).

⁶³⁴ *E.g.*, *In re Pearson*, 223 N.Y.S.2d 15 (Sup. Ct. 1961). *But see*, *Charles Hegewald Co. v. State ex rel. Hegewald*, 196 Ind. 600, 149 N.E. 170 (1925).

⁶³⁵ *Hohman v. Illinois-Iowa Power Co.* 305 Ill. App. 17, 26 N.E.2d 420 (1940) (for solicitation of proxies); *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235 (1941) (for derivative suit); *Hanrahan v. Puget Sound Power & Light Co.*, 332 Mass. 586, 126 N.E.2d 499 (1955) (for dissemination of information regarding merger); *Kahn v. American Cone & Pretzel Co.*, 365 Pa. 161, 74 A.2d 160 (1950) (for efforts to form a committee of shareholders).

⁶³⁶ *E.g.*, *Durr v. Paragon Trading Corp.*, 270 N.Y. 461, 1 N.E.2d 967 (1930).

⁶³⁷ *E.g.*, *State ex rel. Paschall v. Scott*, 41 Wash. 2d 71, 247 P.2d 543 (1952).

⁶³⁸ *E.g.*, *Sawyers v. American Phenolic Corp.*, 404 Ill. 440, 89 N.E.2d 374 (1949).

⁶³⁹ *E.g.*, *Young v. Columbia Broadcasting Sys., Inc.*, 28 Misc.2d 512, 215 N.Y.S.2d 950 (Sup. Ct. 1959).

At common law, the burden was on the petitioning shareholder to allege and prove his good faith and proper purpose.⁶⁴⁰ The modern trend, however, is that a shareholder inspection demand raises a presumption of good faith and proper purpose which shifts the burden of proving an improper purpose to those objecting to the inspection.⁶⁴¹ West Virginia adopted this modern approach in 1909 and should continue to follow it under the pending Act.⁶⁴²

A writ of mandamus is the proper method to compel inspection of books and records in the event that the corporation refuses access after a proper purpose has been shown.⁶⁴³ To utilize this extraordinary writ, the shareholder must first make a demand and have it refused.⁶⁴⁴

The same standards that apply to business corporations should also apply to nonprofit corporations under the pending Act.⁶⁴⁵ Because of the nature of nonprofit corporations, the problems of showing proper purpose, penalties, and holding requirements are not usually encountered.

In many instances, books, records, or other papers must be properly acknowledged before they are considered valid. The provisions of the pending Act concerning acknowledgments⁶⁴⁶ are identical to those of the current Act.⁶⁴⁷ As before, a corporation may acknowledge any deed or instrument required by law to be acknowledged through its appointed attorney or by the president or any vice president of the corporation.⁶⁴⁸ The appointment of the

⁶⁴⁰ *E.g.*, *Albee v. Lamson & Hubbard Corp.*, 320 Mass. 421, 69 N.E.2d 811 (1946).

⁶⁴¹ *E.g.*, *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647 (St. Louis App. 1956).

⁶⁴² *State ex rel. Keller v. Grymes*, 65 W. Va. 451, 64 S.E. 728 (1909). Prior to the passage of W. VA. CODE ANN. § 31-1-74 (1972 Replacement Volume), this case held that the corporation must prove an improper purpose to defeat the right of inspection. Section seventy-four made *Grymes* inappropriate, but the pending Act's replacement of that section should give new life to *Grymes*.

⁶⁴³ *Daurelle v. Traders Fed. Sav. & Loan Ass'n*, 143 W. Va. 674, 104 S.E.2d 320 (1958).

⁶⁴⁴ *State ex rel. Woodward v. Black Betsey Consol. Coal Co.*, 102 W. Va. 659, 136 S.E. 182 (1926).

⁶⁴⁵ See Acts § 31-1-143.

⁶⁴⁶ Acts § 31-1-74.

⁶⁴⁷ See W. VA. CODE ANN. § 31-1-76 (1972 Replacement Volume). The pending section is not contained in the Model Business Corporation Act.

⁶⁴⁸ A certificate of acknowledgment of a deed conveying real estate by a corporation must show that the officer or agent executing it was sworn and deposed to the facts contained in the certificate. The absence of such phrasing renders the

attorney under seal may be embodied in the deed or instrument to be acknowledged or contained in a separate instrument.

The provision in the pending Act which governs the closing of transfer books and the fixing of a record date for business corporations⁶⁴⁹ is identical to that in the Model Business Corporation Act.⁶⁵⁰ The current Act contains a provision covering this area,⁶⁵¹ but it differs somewhat from the pending Act. The primary difference between the current and pending Acts is in the manner that the board of directors receives the authority to fix record dates or close the transfer books. While the current Act provides for this power to be given in the bylaws, the pending Act grants the power directly by statute. Additionally, the current Act allows the dates to be put in the bylaws directly, taking the power to fix them from the board.

The pending provision extends the period of time that stock transfer books may be closed from a maximum of forty days to a maximum of fifty days. The additional changes found in the pending Act do not alter substantially the present practice but merely delineate with more particularity the procedure to be followed in cases involving record dates and the closing of transfer books.

At common law, absent a statute to the contrary, transfer books could be closed for a reasonable time, but there was no power to determine voting or other rights on the basis of utilization of a record date. Therefore, prior to statutes allowing fixing of record dates, it was necessary to close the transfer books for at least the number of days notice required to be given for a shareholders' meeting. Although still permitted in most states, the practice of closing transfer books has become obsolete. It is usually much easier to use record dates and thus allow the continuous trading of shares and the uncomplicated operation of the corporation.⁶⁵²

For obvious reasons, the record date must be fixed in advance of the day it is to occur. The rules of the New York Stock Exchange require that notice of any record date be given at least ten days in advance so that shareholders can transfer what they wish before that date.⁶⁵³ The pending Act complies with this.

acknowledgment fatally defective and does not entitle such deed to be recorded. *Abney v. Ohio Lumber & Mining Co.* 45 W. Va. 446, 32 S.E. 256 (1898).

⁶⁴⁹ Acts § 31-1-91.

⁶⁵⁰ 1 MODEL BUS. CORP. ACT ANN. § 30 (2d ed. 1971).

⁶⁵¹ W. VA. CODE ANN. § 31-1-20 (1972 Replacement Volume).

⁶⁵² 1 MODEL BUS. CORP. ACT ANN. § 30, ¶ 2 (2d ed. 1971).

⁶⁵³ *Id.*

The pending Act expressly recognizes that a shareholder entitled to vote at any meeting on the basis of a record date shall also be entitled to vote at any adjournment thereof. This applies even if the adjourned meeting is more than fifty days after notice of the meeting is given. Whether the entitlement of the shareholder to vote carried over to the adjourned meeting was not clear prior to this provision.⁶⁵⁴

One additional area that the pending Act covers is how shareholders' rights are determined in the event that no record date is fixed or the transfer books are not closed. If the board of directors fails to act, the date the notice of the meeting is mailed or the date the dividend is declared, as the case may be, becomes the record date.

At times, distribution of the dividend may become a problem, especially if, after a dividend is declared, the share is transferred. Formerly, the practice was to close the transfer books through the dividend payment date. Today most corporations fix a record date for determination of those entitled to the dividend and a later payment date to allow for the mechanics of distribution.⁶⁵⁵ This latter method seems to be preferred because it does not interfere with the free transfer of corporate shares. There appears to be no case law in West Virginia concerning these pending provisions. This is probably due to the fact that record dates and closing of transfer books are used more with the large public corporations rather than the smaller types of corporations generally found in West Virginia. Most existing case law concerning these provisions has resulted from controversies arising when stock is transferred after the record date but before the vote or dividend payment.⁶⁵⁶

The officer of the business corporation in charge of the stock transfer books must compile a complete record of the shareholders entitled to vote at any properly called meeting.⁶⁵⁷ This provision is new to West Virginia statutory law⁶⁵⁸ but is identical to section

⁶⁵⁴ See, e.g., *McDonough v. Foundation Co.*, 7 Misc. 2d 571, 155 N.Y.S.2d 67 (Sup. Ct. 1956).

⁶⁵⁵ 1 MODEL BUS. CORP. ACT ANN. § 30, ¶ 2 (2d ed. 1971).

⁶⁵⁶ *Id.* at ¶ 4.02. This work collects several examples of cases dealing with these types of problems.

⁶⁵⁷ Acts § 31-1-92.

⁶⁵⁸ W. VA. CODE ANN. § 31-1-74 (1972 Replacement Volume) did contain the provision concerning books and records, but no mention was made concerning voting records.

thirty-one of the Model Business Corporation Act. This provision serves to ascertain who the record holders are so that attendance, the presence of a quorum, and the voting rights of proxies may be determined. The alphabetical list⁶⁵⁹ required by this section simplifies these tasks, especially with large corporations having many shareholders and bulky books and records.⁶⁶⁰

The officer or agent who fails to prepare this record of shareholders shall be liable to any shareholder who suffers damages because of the failure. Of the possible penalties,⁶⁶¹ this method seems to be the best. Making the erring officer or agent ineligible for further election does not ameliorate the problem of the aggrieved shareholder, and adjournment of the meeting to correct the defect would impede corporate functioning. The procedure selected serves both to penalize the one who fails to comply and to compensate the one damaged.⁶⁶²

The provision is silent as to how long the voting record must be kept and where it is to be kept. Although the manner of record keeping varies with the size and type of corporation, the voting record should be kept with the minutes of the meeting for at least the time that the statute of limitations would not bar an action arising from an improperly prepared record.

3. *Annual Reports of Nonprofit Corporations*

Each domestic nonprofit corporation and each foreign nonprofit corporation authorized to conduct affairs or do or transact business in West Virginia will be required under the pending Act to file an annual report of its activities with the Secretary of State.⁶⁶³ No annual report is required under the current Act.⁶⁶⁴ Failure of the corporation to file this report for three successive years may result in its dissolution.⁶⁶⁵ If a corporation wishes to

⁶⁵⁹ Because of the shareholder's right of inspection granted by section 105 of the pending Act, the document required to be produced by section ninety-two is limited to the alphabetical list of those eligible to vote at the meeting.

⁶⁶⁰ 1 MODEL BUS. CORP. ACT ANN. § 31, ¶ 2 (2d ed. 1971).

⁶⁶¹ *Id.*

⁶⁶² Some states have no penalty for officers or agents who fail to provide the list when required. *Id.* at ¶ 3.02.

⁶⁶³ Acts § 31-1-159.

⁶⁶⁴ See W. VA. CODE ANN. § 31-1-4a (1972 Replacement Volume), which contains special provisions relating to nonstock corporations. No mention of annual reports is contained therein.

⁶⁶⁵ Acts § 31-1-160. Nonprofit corporations may be involuntarily dissolved for other reasons. See Acts § 31-1-41.

remain active, it can, after notice of its pending dissolution, file the past due annual reports. A hearing can also be requested by the corporation to explain its reasons for failing to file the required reports.⁶⁶⁶ The steps delineated in the pending Act seem to be designed in such a manner to assure the existence of a nonprofit corporation in spite of its failure to comply with the annual report provisions. This scheme is desirable because of the nature of nonprofit corporations.⁶⁶⁷

4. *Defense of Ultra Vires*

The doctrine of ultra vires concerns the actions of a corporation that exceed its powers as defined by its charter or acts of incorporation or as implied or expressed by law.⁶⁶⁸ Such acts may be declared null and void by proceedings in equity.⁶⁶⁹ The ultra vires doctrine in West Virginia, heretofore consisting of case law principles, has been codified by the pending Act.⁶⁷⁰ In addition, the pending Act asserts that a corporation's mere lack of capacity or power to do an act does not make the act per se invalid; such lack of capacity or power must first be questioned.⁶⁷¹ A shareholder, member, or director may seek an injunction against a corporation for ultra vires acts.⁶⁷² Likewise, the corporation itself, either through a legal representative or via a class action by the shareholders, may sue past or present officers or directors of the corporation for unauthorized acts, and such officers and directors may be held liable for damages resulting therefrom.⁶⁷³ Furthermore, the interests of the State are protected, as the pending Act allows the Attorney General to either bring an action to dissolve the corporation or to enjoin the corporation from performing unauthorized

⁶⁶⁶ Acts § 31-1-160.

⁶⁶⁷ Many of such corporations are charitable in nature.

⁶⁶⁸ BLACK'S LAW DICTIONARY 1692 (rev. 4th ed. 1968). Ultra vires acts must be distinguished from mere illegal acts, such as a corporation's failure to file documents as required by law. However, in some cases ultra vires acts may also be illegal.

For a brief discussion of ultra vires, see 58 W. VA. L. REV. 297 (1958). A good analysis of the historical development of the doctrine is contained in W. CARY, CORPORATIONS 50-62 (4th ed. 1970).

⁶⁶⁹ Ravenswood, S. & G. Ry. v. Woodyard, 46 W. Va. 558, 33 S.E. 285 (1899).

⁶⁷⁰ Acts § 31-1-10.

⁶⁷¹ Acts § 31-1-10. This section is patterned after section seven of the Model Business Corporation Act.

⁶⁷² Acts § 31-1-10(a).

⁶⁷³ Acts § 31-1-10(a); see 1 MODEL BUS. CORP. ACT ANN. § 7, ¶ 2 (2d ed. 1971).

acts.⁶⁷⁴ Because of the limitations of the statutory provision, lack of capacity or power may be asserted only in the three circumstances described in the statute.⁶⁷⁵ However, the Act does effectively mirror prior practice.⁶⁷⁶

If a shareholder, member, or director seeks to enjoin the corporation from performing or continuing to perform a contract which is *ultra vires*, a court may set aside and enjoin the performance of the contract and may award compensation to the corporation or to the other parties to the contract for loss or damage resulting from such court action. No anticipated profits shall be awarded by the court in any event as a loss or damage sustained.⁶⁷⁷ In addition, the Act infers that where an executory *ultra vires* contract is involved, the corporation, or any other party to the contract, is prevented from raising the *ultra vires* defense, and where a partially executed *ultra vires* contract exists, a party who has received benefits from such a contract is estopped from asserting the defense.⁶⁷⁸

In conclusion, this statutory provision is significant in the respect that it codifies the longstanding common law doctrine of *ultra vires*. The right to bring actions against unauthorized acts is clearly limited to certain circumstances in this section, but these limitations reflect the same protection of interests that existed at common law. Moreover, the section does not affect the traditional defense of illegality.

If any defect in this provision can be noted, it is the lack of the statute to mention the application of laches to proceedings thereunder. Lack of capacity or power may be asserted against a corporation's executory, partially executed, or fully executed acts, but there is no mention of the necessity of a "reasonable time" to exist between the point at which a party in interest learns of an unauthorized act performed or to be performed and the point at which proceedings are brought. However, equitable considerations should preclude any action under this statute after a long period of acquiescence by any of the parties in interest.⁶⁷⁹

⁶⁷⁴ Acts § 31-1-10(c).

⁶⁷⁵ *Brewer v. First Nat'l Bank*, 202 Va. 807, 814, 120 S.E.2d 273, 279 (1961).

⁶⁷⁶ Nonshareholders cannot sue if a corporation is exceeding its powers. *Watson v. Fairmont & Suburban Ry.*, 49 W. Va. 528, 39 S.E. 193 (1901). For a discussion of the methods of questioning *ultra vires* acts of corporations prior to codification, see 4 M.J. *Corporations* § 220 (1949).

⁶⁷⁷ Acts § 31-1-10(a).

⁶⁷⁸ 1 MODEL BUS. CORP. ACT ANN. § 7, ¶ 2 (2d ed. 1971). This changes the case law existing in many jurisdictions but apparently not in West Virginia.

⁶⁷⁹ See *Brewer v. First Nat'l Bank*, 202 Va. 807, 120 S.E.2d 273 (1961).

IV. DISSOLUTIONS

The sections of the pending Act dealing with dissolutions will make some drastic changes in the present West Virginia law on voluntary and involuntary dissolutions. Many of these changes, particularly in the area of voluntary dissolutions, are procedural rather than substantive, but some significant substantive changes have also been made.

A. Voluntary Dissolutions

The pending Act revises the entire procedure for voluntary dissolution from start to finish. It changes the dissolution process from a one-step procedure requiring a single filing with the Secretary of State to what is essentially a two-step process requiring two filings. Under the current Act, the shareholders or members vote to dissolve the corporation, a certificate of dissolution is filed with the Secretary of State, and the corporation is then liquidated.⁶⁸⁰ Under the pending Act, the corporation, after deciding to dissolve, must file an initial statement of intent to dissolve with the Secretary of State, liquidate the assets and business of the corporation, and then file articles of dissolution. The new procedure is designed to provide a more orderly demise for the dissolving corporation.⁶⁸¹

The major exception to this two-step process is found in the section of the pending Act that allows dissolution by the incorporators if the corporation has not commenced business or issued any stock.⁶⁸² The current Act allows dissolution by the incorporators under similar circumstances, but only if done within the fiscal year of the corporation's creation.⁶⁸³ The pending Act does not set a time limit and, therefore, makes it possible for the incorporators to dissolve at any time as long as it has not commenced business or issued any stock. This procedure is particularly desirable for name-holding corporations⁶⁸⁴ or corporations whose purpose for existing never became viable, because it eliminates the need for the issuance of shares, the election of directors or officers, and the possible

⁶⁸⁰ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁶⁸¹ 2 MODEL BUS. CORP. ACT ANN. § 85, ¶ 2 (2d ed. 1971).

⁶⁸² Acts § 31-1-124. This section is substantially the same as section eighty-two of the Model Business Corporation Act.

⁶⁸³ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁶⁸⁴ A name-holding corporation is one which conducts no business and owns no property, but which pays the necessary taxes to prevent the name it bears from being used by anyone else. Acts § 31-1-12 allows the reservation of a name, but only for certain limited purposes.

liability for additional taxes, while at the same time, by the terms of the articles of dissolution, protecting interested parties.⁶⁸⁵

To take advantage of this provision of the pending Act, a majority of the incorporators must submit articles of dissolution, verified and executed in duplicate, to the Secretary of State.⁶⁸⁶ He will perform the required tax check⁶⁸⁷ and, if he finds no taxes owing and all fees paid, accept the articles for filing by endorsing each original, returning one and retaining the other for his files. If the corporation's certificate of incorporation has been recorded in the office of any county clerk, the certificate of dissolution must also be recorded in that office. For all intents and purposes, the corporate existence will cease after this recordation.⁶⁸⁸ Since the recordation requirements of the current⁶⁸⁹ and pending Acts are the same, compliance should present no problems.

The two other sections of the pending Act that provide for voluntary dissolution of business corporations both adhere to the two step procedure. The first permits dissolution upon the unanimous written consent of all the shareholders,⁶⁹⁰ and the second allows it after recommendation of the board of directors and majority vote of the shareholders.⁶⁹¹

Voluntary dissolution by unanimous written consent of the shareholders is possible under the current Act but is probably not widely used because the procedure for doing so is not particularly clear.⁶⁹² The pending Act sets the procedure out in detail, and,

⁶⁸⁵ 2 MODEL BUS. CORP. ACT ANN. § 82, ¶ 2 (2d ed. 1971).

⁶⁸⁶ Acts § 31-1-124. The articles must be executed in duplicate by a majority of the incorporators and verified by them. They must contain the name of the corporation, the date its charter was issued, the assurances that no shares have been issued, that it has not commenced business, that any money received in payment of stock subscriptions has been repaid to those entitled to it, that the corporation owes no debts, and that a majority of the incorporators elect it be dissolved.

⁶⁸⁷ Acts § 31-1-61.

⁶⁸⁸ Acts § 31-1-124. If no recordation is required, the corporate existence appears to cease upon issuance of the certificate of dissolution by the Secretary of State.

⁶⁸⁹ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁶⁹⁰ Acts § 31-1-125. This section is identical to section eighty-three of the Model Business Corporations Act.

⁶⁹¹ Acts § 31-1-126. This section is identical to section eighty-four of the Model Business Corporation Act.

⁶⁹² W. VA. CODE ANN. § 31-1-68 (1972 Replacement Volume). This section provides that the shareholders may do anything by unanimous written consent which can be done at a meeting. By applying it in conjunction with W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume), the shareholders can dissolve the corporation by unanimous written consent.

because of the advantages of this method for small, closely held corporations,⁶⁹³ it should come into general use. After the shareholders have given unanimous written consent, a statement of intent to dissolve⁶⁹⁴ must be executed and filed with the Secretary of State.⁶⁹⁵

The final route a business corporation can take to voluntary dissolution⁶⁹⁶ under the pending Act is initiated when the board of directors adopts a resolution recommending that the question of dissolution be submitted to a meeting of the shareholders. The matter may be submitted at either an annual or a special meeting, but each shareholder must be given written notice that the resolution will be considered, and a vote on the resolution must be taken. If a majority of the shareholders vote in favor of the resolution, it will be adopted,⁶⁹⁷ and a statement of intent to dissolve⁶⁹⁸ must then be submitted to the Secretary of State. By allowing dissolution by only majority vote, the pending Act will change the current law which requires a sixty percent favorable vote of the shareholders in order to approve dissolution.⁶⁹⁹

After the statement of intent to dissolve has been properly drafted, executed, and verified, regardless of whether dissolution is to be by act of the corporation⁷⁰⁰ or by consent of the shareholders,⁷⁰¹ the next step is to file it with the Secretary of State. The

⁶⁹³ 2 MODEL BUS. CORP. ACT ANN. § 82, ¶ 2 (2d ed. 1971).

⁶⁹⁴ Acts § 31-1-125. This section provides the statement must be executed by the president or a vice president and the secretary or an assistant secretary and verified by one of them. It must contain the name of the corporation, the names and addresses of its officers, the names and addresses of its directors, a copy of the written consent signed by all the shareholders, and a statement that the consent has been signed by all the shareholders or their authorized attorneys.

⁶⁹⁵ The effect of this filing is discussed later in the text.

⁶⁹⁶ Acts § 31-1-126.

⁶⁹⁷ *Id.* This section provides for approval by majority vote, but if any class is entitled to vote as a class on the question of dissolution, a majority of the shares in the class must vote in favor of the resolution for it to be adopted.

⁶⁹⁸ *Id.* This section provides that the statement must be executed in duplicate by the president or a vice president and by the secretary or an assistant secretary and verified by one of them; it must contain the name of the corporation, the names and addresses of the officers, the names and addresses of the directors, the number of shares outstanding and the shares, if any, that are entitled to vote as a class, the number of shares voted for and against the resolution, if any shares voted as a class, the number for and against in each class, and a copy of the resolution which authorizes the corporation to dissolve.

⁶⁹⁹ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁷⁰⁰ Acts § 31-1-125.

⁷⁰¹ Acts § 31-1-126.

Secretary's job is to make sure that the statement conforms with the law and that all fees have been paid. After he satisfies himself that these things have been done, he will endorse each of the duplicate originals, file one in his office, and return the other to the corporation or its representative.⁷⁰² Since the Secretary of State is also required to obtain a tax clearance before he can issue a certificate of dissolution,⁷⁰³ he should initiate the necessary procedures to obtain that clearance at this time.

The filing with the Secretary of State constitutes notice of the impending dissolution to the State and the populace.⁷⁰⁴ After the filing, the corporation is powerless to conduct any business not connected with winding up its business and affairs.⁷⁰⁵ This interim period during which the corporation must wind up its affairs before dissolution represents a change from the current Act. Under present procedure, the officers and directors are responsible for winding up the corporation after dissolution.⁷⁰⁶ The pending Act provides an interim period prior to dissolution in order to assure the corporation will be liquidated in an orderly manner.

After filing with the Secretary of State, the pending Act requires the corporation to mail notice of its impending dissolution to each creditor.⁷⁰⁷ Under the current Act, the corporation is only required to publish notice of the dissolution, and the creditor must then present his claim to the corporation in a timely manner.⁷⁰⁸ The pending Act places a much higher standard on the dissolving corporation.

During the interim period, the corporation must also collect its assets, pay its bills, and distribute any excess to the shareholders.⁷⁰⁹ If the corporation finds it cannot comply with these requirements, it may apply to the appropriate circuit court⁷¹⁰ and have the

⁷⁰² Acts § 31-1-127. This section is substantially the same as section eighty-five of the Model Business Corporation Act.

⁷⁰³ Acts § 31-1-61.

⁷⁰⁴ 2 MODEL BUS. CORP. ACT ANN. § 85, ¶ 2 (2d ed. 1971).

⁷⁰⁵ Acts § 31-1-128. This section is substantially the same as section eighty-six of the Model Business Corporation Act.

⁷⁰⁶ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁷⁰⁷ Acts § 31-1-129. This section is substantially the same as section eighty-seven of the Model Business Corporation Act.

⁷⁰⁸ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁷⁰⁹ Acts § 31-1-129.

⁷¹⁰ Acts § 31-1-134. This section of the pending Act defines the appropriate circuit court as the circuit court of the county in which the corporation has its

liquidation and dissolution carried out under the court's supervision.⁷¹¹

One advantage of the pending Act's two-step dissolution process is that it can be stopped if it becomes desirable to continue the corporate existence. The statement of intent to dissolve may be revoked by written consent of the shareholders⁷¹² or by act of the corporation⁷¹³ at any time prior to the issuance of the certificate of dissolution. Regardless of the type of revocation proceedings undertaken, a statement of revocation of voluntary dissolution proceedings must be executed and submitted to the Secretary of State. He will ensure that it conforms with the law and, when all fees are paid, endorse each duplicate, file one, and return the other to the corporation.⁷¹⁴ The filing of the statement restores full power

principal office, or if there is no such office in the State, the court for the county in which any of the stockholders reside or are found or where the corporation has property. This section is not found in the Model Business Corporation Act, but is carried over from W. VA. CODE ANN. § 31-1-81 (1972 Replacement Volume).

⁷¹¹ Acts § 31-1-129.

⁷¹² Acts § 31-1-130. This section is substantially the same as section eighty-eight of the Model Business Corporation Act. In case of revocation by the shareholders, it is necessary for all the shareholders to execute a written consent and for the president or vice president and a secretary or an assistant secretary to execute a statement of revocation of voluntary dissolution proceedings in duplicate verified by one of them. The statement must set forth the name of the corporation, the names and addresses of the directors, the names and addresses of the officers, a copy of the written consent signed by all the shareholders, and a statement that the consent has been signed by all shareholders or in their names by their duly authorized attorneys.

⁷¹³ Acts § 31-1-131. The revocation procedure is initiated by resolution of the board of directors who recommend the dissolution proceedings be revoked and direct that a special meeting of the shareholders be called to consider the question. Written notice of the meeting and its purpose is then sent to each shareholder of record. At the meeting of the shareholders, the resolution will be voted on; a majority vote will be required to adopt it. After adoption, a statement of revocation of the voluntary dissolution proceedings will be executed in duplicate by the president or a vice-president and by the secretary or an assistant secretary and verified by one of them. The statement should contain the name of the corporation, the names and addresses of the officers, the names and addresses of the directors, a copy of the resolution revoking the proceedings, the number of shares outstanding, and the number voting for and against the resolution. As far as it goes this section is identical to section eighty-nine of the Model Business Corporation Act, but the pending West Virginia Act omits paragraphs (c) and (d) of the Model Act which specify the procedures to be taken at the shareholders' meeting for revocation of the voluntary dissolution proceedings. These provisions in the Model Act are identical to those contained in Acts §§ 31-1-26 (c) & (d). There appears to be no good reason for this omission.

⁷¹⁴ Acts § 31-1-132. This section is substantially the same as section ninety of the Model Business Corporation Act.

to the corporation, and it may again carry on its normal business.⁷¹⁵

The revocation procedure serves a very useful purpose in cases where changed circumstances make it desirable to continue the corporate existence. The only alternative to such a procedure, and the one necessitated by the current Act,⁷¹⁶ is to go through the expensive process of winding up the corporation and then form a new one.⁷¹⁷

If the dissolution proceedings have not been revoked, when all debts have been paid and the remaining assets are distributed,⁷¹⁸ articles of dissolution are to be executed in duplicate, verified, and submitted to the Secretary of State.⁷¹⁹ He will check to see that they conform to the law and that all taxes and fees have been paid.⁷²⁰ If everything is in order, the Secretary will endorse each duplicate, file one, and return the other to the corporation. If a certificate of incorporation is recorded at any county clerk's office, the certificate of dissolution must be recorded there also. After this recording, the normal corporate existence shall cease.⁷²¹

Interestingly enough, a corporation whose charter expires must comply with the requirements for voluntary dissolution before it ceases to be a corporate entity. Its existence will continue

⁷¹⁵ Acts § 31-1-133. This section is identical to section ninety-one of the Model Business Corporation Act.

⁷¹⁶ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume). This section of the current Act effectuates the dissolution at the beginning of the dissolution and liquidation process.

⁷¹⁷ 2 MODEL BUS. CORP. ACT ANN. § 88, ¶ 2 (2d ed. 1971).

⁷¹⁸ Acts § 31-1-39. This section of the pending Act is substantially the same as section ninety-two of the Model Business Corporation Act. It provides among other things, that the remaining assets of a business corporation are to be distributed to the shareholders.

⁷¹⁹ Acts § 31-1-39. This section of the pending Act provides that the articles be executed by the president or a vice president and the secretary or an assistant secretary and verified by one of them. They must state the name of the corporation, that all debts and obligations have been paid or provided for, that all remaining assets have been distributed among the shareholders according to their interests, that no actions are pending against the corporation or that adequate provision has been made for the satisfaction of any adverse judgement, and that the Secretary of State has already filed a statement of intent to dissolve.

⁷²⁰ Acts § 31-1-61. This section of the pending Act provides that a tax clearance is a prerequisite to the issuance of a certificate of dissolution. Section 31-1-82a of the current Act makes the same requirement.

⁷²¹ Acts § 31-1-40. This section of the pending Act is similar to section ninety-three of the Model Business Corporation Act.

beyond its expiration date until it is dissolved in accordance with the procedures for voluntary dissolution.⁷²²

B. Involuntary Dissolution

The current Act allows the holders of one-fifth of the outstanding shares to bring suit to compel the dissolution of the corporation upon a showing of sufficient cause.⁷²³ Although neither the current Act nor West Virginia case law defines sufficient cause, it appears that specific acts of mismanagement have to be shown before the court will intervene and liquidate the corporation.⁷²⁴ These acts may be of either omission or commission, but definite acts of misconduct on the part of management or the majority of shareholders must exist.

The pending Act retains the one-fifth requirement⁷²⁵ as a condition precedent to suit⁷²⁶ and spells out those acts that constitute sufficient cause.⁷²⁷ Several of these grounds, deadlock of manage-

⁷²² Acts § 31-1-64.

⁷²³ W. VA. CODE ANN. § 31-1-81 (1972 Replacement Volume).

⁷²⁴ See *Hall v. McLuckey*, 134 W. Va. 595, 60 S.E.2d 280 (1950); *Hirsh v. Independent Steel Co.*, 196 F. 104 (D.C.S.D.W. Va. 1911).

⁷²⁵ Acts § 31-1-134.

⁷²⁶ See *Rainey v. Freeport Coal & Coke Co.*, 58 W. Va. 424, 52 S.E. 528 (1908).

⁷²⁷ Acts § 31-1-41. This section of the pending Act is substantially the same as section ninety-seven of the Model Business Corporation Act. It provides:

(a) Any of the circuit courts or inferior courts of record with general civil jurisdiction shall have full power to liquidate the assets and business or affairs of a corporation in an action by a shareholder or member when it is established:

(1) That the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation is being suffered or is threatened by reason thereof and either that the shareholders or members are unable to break the deadlock or there are no shareholders or members having voting rights; or

(2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

(3) That the shareholders or members entitled to vote in the election of directors, are deadlocked in voting power, and have failed for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(4) That the corporate assets are being misapplied or wasted; or,

(5) In addition, in the case of a nonprofit corporation, that such corporation is unable to carry out its purposes.

(b) Such courts shall also have full power to liquidate the assets and business or affairs of a corporation in an action by a creditor:

(1) When the claim of the creditor has been reduced to judgment

ment, oppressive conduct, and deadlock of shareholders, are new to the law of West Virginia and will allow a dissatisfied shareholder greater opportunity to remove himself from an untenable situation.

The first ground under which a shareholder can compel liquidation and ultimate dissolution of the corporation occurs when the directors are deadlocked, the shareholders cannot break the deadlock, and it is causing or about to cause irreparable harm to the corporation.⁷²⁸ The key to the applicability of this ground is the proof of irreparable harm. Because courts are traditionally reluctant to institute so radical a remedy as dissolution, the burden of proof required of the plaintiff is likely to be quite high. One court, applying a provision similar to this, found that drastically dropping sales, rapid accumulation of accounts receivable for want of attention, and an inability to agree on inventory values for tax purposes constituted a threat of irreparable harm, but intimated that any less proof might not have been sufficient to invoke this section.⁷²⁹

Because the prerequisites of this section are very stringent and because other grounds provided by the pending Act may prove

and an execution thereon has been returned unsatisfied and it is established that the corporation is insolvent; or

(2) When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established [*sic*] that the corporation is insolvent.

(c) Such courts shall also have full power to liquidate the assets or business or affairs of the corporation:

(1) Upon application by a corporation which has filed a statement of intent to dissolve, as provided in this article, to have its liquidation continued under the supervision of the court; or

(2) In the case of a business corporation, when an action has been filed pursuant to the provisions of section eighty-six, article twelve, chapter eleven of this code, to dissolve a corporation and it is established that liquidation of its assets and business of affairs should precede the entry of an order of dissolution.

(d) Actions or proceedings brought under subsection (a) or (b), or under subdivision (1) of subsection (c) of this section, shall be brought in the county in which the principal office of the corporation is situated, or if there be no such office in this state, in the county in which any one or more of its shareholders or members reside or are found or in which the property of such corporation, or any part of it, may be.

(e) It shall not be necessary to make shareholders or members parties to any such action or proceedings unless relief is sought against them personally.

⁷²⁸ No comparable ground exists under the current Act.

⁷²⁹ Goldstein v. Studley, 452 S.W.2d 75 (Mo. Super. 1970).

easier to apply, deadlock of management probably will not achieve widespread use as a ground for dissolution. But it will have particular applicability to small or family-held companies where stock ownership, directorships, or voting power is evenly divided between two groups.⁷³⁰ It will also have special applicability to some non-profit corporations which do not have voting members and are managed solely by a board of directors.

Proof of illegal, oppressive, or fraudulent acts by those in control of the corporation is the pending Act's second ground for court-ordered liquidation and dissolution. While the terms illegal and fraudulent are not unknown to the law of West Virginia, oppressive is a new term. Fraudulent, oppressive, and illegal are not synonymous terms.⁷³¹ Each has its own limited definition.

Generally speaking, an illegal act is one which is "[n]ot authorized by law; illicit; unlawful; contrary to law," but the "[t]erm does not imply that the act spoken of is immoral or wicked; it only implies a breach of the law."⁷³² Therefore, the term illegal, as used in the pending Act, should not require a violation of the criminal law before it becomes applicable. Instead, it should come into play when those in control are not complying with the law in their operation of the corporation.

Fraudulent is defined as "based on fraud; proceeding from or characterized by fraud; tainted by fraud; done, made, or effected with the purpose or design to carry out a fraud."⁷³³ Therefore, to act in a fraudulent manner would be to perpetrate a fraud. Fraud is defined as

[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.⁷³⁴

West Virginia has divided fraud into two categories—constructive and actual. They are distinguishable in that

⁷³⁰ 2 MODEL BUS. CORP. ACT ANN. § 97, ¶ 2 (2d ed. 1971).

⁷³¹ *Gidwitz v. Lanzit Corrugated Box Co.* 20 Ill. 2d 208, 170 N.E.2d 131 (1960).

⁷³² BLACK'S LAW DICTIONARY 882 (rev. 4th ed. 1968).

⁷³³ *Id.* at 789.

⁷³⁴ *Id.* at 788.

actual fraud requires an intent to deceive. "Actual fraud is intentional fraud; it consists in deception, intentionally practiced, to induce another to part with property or surrender some legal right, and which accomplishes the end designed."⁷³⁵ Close examination renders inevitable the conclusion that the conduct the drafters are alluding to as fraudulent is that which the West Virginia courts call actual fraud. They could not have intended the application of so drastic a remedy as dissolution to result solely from a compromising set of circumstances absent any wrongful intent.

Oppression, on the other hand, has a limited history in this country, and none at all in West Virginia, as a grounds for dissolution. Fortunately some courts have attempted, with mixed success, to construe the meaning of oppressive acts as it appears in the pending Act. Clearly the corporation does not have to be in imminent danger in order to invoke oppression as a ground for dissolution,⁷³⁶ but the oppression must at least be blatant.⁷³⁷

In England, the Companies Act of 1948⁷³⁸ designated oppression of the minority by the majority as a ground for which relief could be granted.⁷³⁹ The English courts have had several occasions to construe the conduct that should be classified as oppressive. In *Elder v. Elder & Watson Ltd.* oppressive conduct was construed as "a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."⁷⁴⁰ And in *Scottish Co-operative Wholesale Society, Ltd. v. Meyer*, Viscount Simonds said it was "burdensome, harsh, and wrongfull"⁷⁴¹ conduct; while Lord Keith said it meant "a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members."⁷⁴² The pecuniary interest of the majority has no bearing on the oppressive nature of its conduct.⁷⁴³

⁷³⁵ *Miller v. Bridge Co.*, 123 W. Va. 320, 334, 15 S.E.2d 687, 695 (1941).

⁷³⁶ See *White v. Perkins*, 213 Va. 124, 189 S.E.2d 315 (1972); *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208, 170 N.E.2d 131 (1960); *Central Standard Life Ins. Co. v. Davis*, 10 Ill. 2d 566, 141 N.E.2d 45 (1957).

⁷³⁷ *Polikoff v. Dole & Clark Bldg. Corp.*, 37 Ill. 2d 29, 184 N.E.2d 792 (1962).

⁷³⁸ 11 & 12 Geo. 6, c. 38, § 210.

⁷³⁹ See also *McPherson, Oppression of Minority Shareholders*, 36 Aus. L.J. 404 (1963).

⁷⁴⁰ [1952] Sess. Cas. 49, 55 (Scot.).

⁷⁴¹ [1959] A.C. 324, 342 (1958) (Scot.).

⁷⁴² *Id.* at 364.

⁷⁴³ *In re H.R. Harmer, Ltd.*, [1959] 1 W.L.R. 62 (C.A.).

Oppression may be present from the point of view of the minority shareholders when the majority shareholder, on the strength of his control, acts contrary to the decision of, or without the authority of, the board of directors. The minority is entitled to have the affairs of the company conducted in the manner set out by the company's charter.⁷⁴⁴ Put another way, oppression "connotes . . . an abuse of power by some person or persons controlling the company, resulting in injury to the rights of some part of its members."⁷⁴⁵

The American cases which have considered oppression under statutes similar to the pending West Virginia statute generally refer to the British cases and accept their explanations of oppressive conduct. In *Gidwitz v. Lanzit Corrugated Box Co.*,⁷⁴⁶ the Illinois court was confronted with a company whose stock was evenly divided and whose president, representing one group, ran the company without consulting the board of directors or the other group. The court found that the high-handed actions of the president were oppressive because they denied the plaintiff group a voice in running the company.

In *White v. Perkins*⁷⁴⁷ the Virginia court found a majority of shareholder's conduct oppressive when he ran the company to suit himself and refused to pay dividends even though the minority shareholder had to pay taxes on his portion of the undistributed earnings under a Subchapter S election.

Any attempt to formulate an all inclusive definition of oppressive conduct at this point is doomed to failure. But clearly it would be oppressive for those in control to go an extended period of time without observing the corporate formalities designed to give those out of control an opportunity to voice their views on the operation of the company. And it would be oppressive for them to deliberately create a financial hardship for those out of control by depressing earnings, unreasonably refusing to issue dividends, or some other unjustifiable act. What conduct constitutes oppression is still not concretely defined, but the inclusion of it as grounds for involuntary dissolution represents a major change in the West Virginia law.

⁷⁴⁴ *Id.*

⁷⁴⁵ *Elder v. Elder & Watson Ltd.*, [1952] Sess. Cas. 49, 60 (Scot.).

⁷⁴⁶ 20 Ill. 2d 208, 170 N.E.2d 131 (1960).

⁷⁴⁷ 213 Va. 129, 189 S.E.2d 315 (1972).

Even after the plaintiff shareholder proves that those in control of the corporation have acted in an illegal, oppressive, or fraudulent manner, he must go one step further before he is entitled to court intervention. The plural "acts" is specifically used in referring to the conduct which is proscribed. Therefore, the plaintiff must prove repeated acts on the part of those in control that are illegal, oppressive, or fraudulent; he needs to establish a continuing course of proscribed conduct, not just a single act, before the dissolution remedy becomes available.

The next ground for forced liquidation is deadlock of the shareholders. If the shareholders are deadlocked in voting strength and have failed, for at least two annual meetings, to elect successors to the directors whose terms have expired or would have expired upon the election of their successors, the court is empowered to liquidate and dissolve the corporation. The purpose of this provision is to initiate an orderly procedure whereby the corporation may expire when the shareholders are unable to agree.⁷⁴⁸ But the courts who have considered this provision disagree as to whether the statute mandates the court to liquidate a corporation upon a showing of the requisite deadlock or whether it merely allows the court to do so if it finds such action is in the best interests of the shareholders.

In *Strong v. Fromm Laboratories, Inc.*,⁷⁴⁹ a Wisconsin court held that if deadlock was shown for the statutory period, a dissolution must be granted. The court's conception of what was most beneficial to the shareholders was not considered in deciding the dissolution issue. The statute did not provide it as grounds for consideration, and the court refused to consider it.

Three years later, in *Jackson v. Nicolai-Neppach Co.*,⁷⁵⁰ the Oregon court considered the same question and reached an opposite conclusion. It made a weak attempt to distinguish the *Strong* decision by saying that the controlling factor in *Strong* was that no legally functioning board of directors existed, while in *Jackson* the directors served legally until their successors were elected. The essence of the decision however was a finding that the statutory language did not require the court to liquidate the corporation after finding the deadlock had existed in excess of the statutory period. Claiming that those in control must be treated fairly also,

⁷⁴⁸ 2 MODEL BUS. CORP. ACT ANN. § 97, ¶ 2 (2d ed. 1971).

⁷⁴⁹ 273 Wis. 159, 77 N.W.2d 389 (1956).

⁷⁵⁰ 219 Ore. 560, 348 P.2d 9 (1959).

the court refused to dissolve the prospering business since, in its judgment, such an action was not in the best interest of the stockholders.

Jackson can be criticized on several grounds. First, a great deal of research went into the drafting of this provision, and, if the best interests of the shareholders were to be considered, it seems likely that the statute would have so provided. Second, the doctrine of *expressio unius est exclusio alterius* seems to apply. In the provision dealing with deadlock of management, an irreparable injury was required, but in this section no such special criteria are mentioned. Third, as a matter of policy, the court should not be placed in the position of making a decision on the probable success or failure of the business.⁷⁵¹ Finally, *Jackson* is counter the express intent of the statute, that is, to provide for the orderly demise of corporations where their shareholders cannot reach even the most basic of agreements.⁷⁵² Obviously *Strong* represents the better view on this issue. If the deadlock exists for longer than two annual meetings, the court should order the liquidation and dissolution of the corporation without trying to substitute its judgment for that of the objecting shareholders who actually have something at stake in the controversy.

A shareholder can also compel liquidation and dissolution if he can show that the assets of the corporation are being misapplied or wasted.⁷⁵³ Misapplication is generally defined as the "[i]mproper, illegal, wrongful, or corrupt use or application of funds, property, etc."⁷⁵⁴ While it is commonly used to denote the use of property or money improperly, illegally, or wrongfully in the corrupt sense,⁷⁵⁵ it is not the same as embezzlement,⁷⁵⁶ nor does it necessarily involve moral turpitude.⁷⁵⁷ Misapplication means wrongful application; that is, application which is not authorized.⁷⁵⁸ But it should not cover mere bad judgment in entering into a transaction.⁷⁵⁹ Therefore, in order to compel liquidation, the

⁷⁵¹ See 39 ORE. L. REV. 382 (1960).

⁷⁵² 2 MODEL BUS. CORP. ACT ANN. § 97, ¶ 2 (2d ed. 1971).

⁷⁵³ Acts § 31-1-41(a)(4).

⁷⁵⁴ BLACK'S LAW DICTIONARY 1150 (rev. 4th ed. 1968).

⁷⁵⁵ *Louis Pizitz Dry Goods Co. v. Fidelity & Deposit Co.*, 223 Ala. 385, 136 So. 800 (1931).

⁷⁵⁶ *Williamson v. United States*, 332 F.2d 123 (5th Cir. 1964).

⁷⁵⁷ *Kansas Flour Mills Co. v. American Sur. Co.*, 98 Kan. 618, 158 P. 1118 (1916).

⁷⁵⁸ *Columbus v. Board of Elections*, 13 Ohio Dec. 452 (1903).

⁷⁵⁹ *United States v. Mulloney*, 8 F. Supp. 674 (D. Mass. 1934).

shareholder need not prove any wrongful intent involved in the misapplication, but he must show that the assets were applied to unauthorized and objectionable uses that are likely to cause loss.

Waste, as used in the statute, may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty which results in substantial injury to the assets of the corporation.⁷⁶⁰ It may also be defined as spoil or destruction, done or permitted, to the assets of the corporation to the prejudice of the shareholders.⁷⁶¹ Such a definition, including both voluntary and permissive waste, seems consistent with the current law which permits dissolution after proof of acts of commission or omission that constitute mismanagement.⁷⁶² Therefore, if the assets of the corporation are losing their value unreasonably due to either the acts or omissions of those in control, grounds for liquidation and dissolution exist.

Under the current Act, the complaining shareholders must seek redress for their complaints from the appropriate corporate officials and be rebuffed before they can successfully apply for court intervention,⁷⁶³ unless it would be useless to take such action.⁷⁶⁴ Since the basic logic behind this rule will be as sound under the pending Act as it is under the current Act and the pending Act does not indicate it is to be abrogated, this prerequisite should remain in full force under the pending Act.⁷⁶⁵

Even if grounds requiring the dissolution of the corporation are proven, the majority shareholders can still avoid the dissolution of the corporation. They may purchase at fair market value the shares of the plaintiff stockholders. The pending Act carries this procedure over from the current Act⁷⁶⁶ and, like the current Act, requires the court to enforce it upon application of the majority whether it is agreeable to the minority or not.⁷⁶⁷ If the parties cannot agree on the price for the stock, the Act provides a procedure for the appraisal and the establishment of its fair market value.⁷⁶⁸

⁷⁶⁰ BLACK'S LAW DICTIONARY 1970 (rev. 4th ed. 1968).

⁷⁶¹ 3 BOUVIER'S LAW DICTIONARY 3433 (Rawles rev. 8th ed. 1914).

⁷⁶² See *Hirsch v. Independent Steel Co.*, 196 F. 104 (D.C.S.D.W. Va. 1911).

⁷⁶³ *E.g.*, *Williams v. Croft Hat & Notion Co.*, 82 W. Va. 549, 96 S.E. 929 (1918).

⁷⁶⁴ *E.g.*, *Hall v. McLuckey*, 135 W. Va. 864, 65 S.E.2d 494 (1951).

⁷⁶⁵ *Rathbone v. Gas Co.*, 31 W. Va. 798, 8 S.E. 570 (1888). The shareholder should first attempt to remedy the situation within the corporation and exhaust his remedies there before he applies to the court to settle his problem.

⁷⁶⁶ W. VA. CODE ANN. § 31-1-81 (1972 Replacement Volume).

⁷⁶⁷ Acts § 31-1-134.

⁷⁶⁸ *Id.* The pending Act's appraisal method is substantially the same as the one

Under the pending Act the court can order the liquidation and dissolution of the corporation upon the application of a creditor in two circumstances—first, when a judgment in the creditor's favor is returned unsatisfied and the corporation is insolvent⁷⁶⁹ and, second, when the corporation admits in writing that the claim is due, and it is insolvent.⁷⁷⁰ Under the current practice, only a judgment creditor can prevail upon the court to liquidate the corporation⁷⁷¹ unless obtaining a judgment would be a totally useless exercise.⁷⁷² The pending Act preserves the rule and at least part of the exception. To proceed without a judgment, the creditor must first obtain an admission that the debt is due and owing and then must establish that the corporation is insolvent. The creditor must consider the provisions of the Federal Bankruptcy Act when using a proceeding of this type.⁷⁷³

The pending Act also authorizes the court to liquidate the corporation in two other instances. First, on request of the corporation itself after it has filed a statement of intent to dissolve⁷⁷⁴ and, second, in an action against a business corporation to enforce payment of the franchise tax.⁷⁷⁵ The former operates in conjunction with the provisions for voluntary dissolution⁷⁷⁶ in order to insure the orderly liquidation of the corporation and to protect it from a multitude of suits by creditors and dissatisfied shareholders.⁷⁷⁷ The latter provision is more in the nature of a housekeeping provision to provide an orderly liquidation followed by dissolution.⁷⁷⁸

After the grounds justifying dissolution have been proven, the question arises whether the court, by exercise of some inherent equity power, can grant remedies not provided by the statute? The

provided by the current Act. W. VA. CODE ANN. § 31-1-81 (1972 Replacement Volume). The pending Act provides that the court will appoint three disinterested commissioners who will value the stock. The award of the majority of the commissioners is final when confirmed by the court and may, after judgment is entered, be appealed to the West Virginia Supreme Court of Appeals.

⁷⁶⁹ Acts § 31-1-41(b)(1).

⁷⁷⁰ Acts § 31-1-41(b)(2).

⁷⁷¹ 4 M.J. *Corporations* § 266 (1949).

⁷⁷² Cf. *Nunnally v. Strauss*, 94 Va. 255, 26 S.E. 580 (1897). The corporation was abandoned, insolvent, and had no one to administer its affairs.

⁷⁷³ 2 MODEL BUS. CORP. ACT ANN. § 97, ¶ 2 (2d ed. 1971).

⁷⁷⁴ Acts § 31-1-41(c)(1).

⁷⁷⁵ Acts § 31-1-41(c)(2).

⁷⁷⁶ Acts § 31-1-129(c).

⁷⁷⁷ 2 MODEL BUS. CORP. ACT ANN. § 85, ¶ 2 (2d ed. 1971).

⁷⁷⁸ *Id.* § 97, ¶ 2.

only two courts to face this issue squarely have disagreed on the answer.

In *White v. Perkins* the Virginia court refused to uphold a lower court ruling which ordered a corporation to pay dividends after oppressive conduct justifying dissolution was proven.⁷⁷⁹ The appellate court found the statute⁷⁸⁰ remedial in nature and construed it liberally. Under such a construction, it held that the courts were limited to the relief specified by the statute and retained no inherent equity powers to grant other relief. In *Kirtz v. Grossman* the Missouri court reached the opposite conclusion.⁷⁸¹ Pointing to the language of the statute that says the court "shall have full power to liquidate the assets and business of the corporation,"⁷⁸² it said the language of the statute was permissive, not mandatory.⁷⁸³ Taking this position, the court then applied the maxim, once equity assumes jurisdiction it will do what is necessary to assure that justice is done, and proceeded to grant relief outside the statute.

Of the two positions, Virginia's appears to be more favorable. Clearly the statute is remedial in nature⁷⁸⁴ and should, therefore, be liberally construed. Since West Virginia is in accord with the Virginia principle of liberally construing remedial statutes,⁷⁸⁵ the *White* decision should be followed in this State.⁷⁸⁶

Actions to compel the liquidation of a business corporation may be brought in any circuit court in the county in which the principal office of the corporation is situated, or, if that office is out of state, in the county in which one or more of the stockholders resides or any of the corporate property is located.⁷⁸⁷ Unless relief is sought personally from the shareholders, it is not necessary to make them parties to the suit.⁷⁸⁸

⁷⁷⁹ 213 Va. 129, 189 S.E.2d 315 (1972).

⁷⁸⁰ VA. CODE ANN. § 13.1-94 (1973 Replacement Volume).

⁷⁸¹ 463 S.W.2d 541 (Mo. App. 1971).

⁷⁸² MO. REV. STAT. § 351.485 (1966).

⁷⁸³ The same language is common to VA. CODE ANN. § 13.1-94, MO. REV. STAT. § 351.485, and Acts § 31-1-41.

⁷⁸⁴ A remedial statute is "a statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before." BLACK'S LAW DICTIONARY 1457 (rev. 4th ed. 1968).

⁷⁸⁵ *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953).

⁷⁸⁶ The principles discussed in regard to the *Jackson* and *Strong* cases, in the text accompanying notes 749-52 *supra*, are also applicable here.

⁷⁸⁷ Acts § 31-1-41(d).

⁷⁸⁸ Acts § 31-1-41(c).

Under the pending Act, liquidation precedes the decree of dissolution,⁷⁸⁹ rather than following it as provided by the current Act.⁷⁹⁰ The procedural sections for involuntary dissolution in the pending Act should be read in conjunction with certain sections which deal with voluntary dissolution.⁷⁹¹

After the court has decided that grounds exist which justify liquidation, it will proceed with the liquidation process. In doing so, the court has the power to appoint receivers with whatever powers are necessary to carry on the corporation's business and preserve its assets.⁷⁹² After a hearing of all interested parties, the court may appoint a liquidating receiver to collect all the corporation's assets, including amounts owed by subscribers.⁷⁹³ Such a receiver must be either a natural person who is a United States citizen or a corporation authorized to do business in West Virginia.⁷⁹⁴ The receiver will have the authority, subject to court order, to sell, convey, and dispose of assets and to sue and defend in his own name as receiver for the corporation.⁷⁹⁵ His specific powers will be stated in the order of the court that appoints him and such orders may be modified at any time during the proceedings.⁷⁹⁶ The court is authorized to allow compensation the receivers and the attorneys during the proceedings from the corporate assets or the sale of them.⁷⁹⁷ The court appointing the receiver has exclusive jurisdiction over the corporation and its property wherever it is situated,⁷⁹⁸ and in all cases has the power to require bond from the receiver and specify the surety.⁷⁹⁹ These provisions of the pending Act do not result in any substantial change from the current Act.⁸⁰⁰

During the proceedings, the court may require all creditors to

⁷⁸⁹ 2 MODEL BUS. CORP. ACT ANN. § 98, ¶ 2 (2d ed. 1971).

⁷⁹⁰ W. VA. CODE ANN. § 31-1-83 (1972 Replacement Volume).

⁷⁹¹ 2 MODEL BUS. CORP. ACT ANN. § 98, ¶ 2 (2d ed. 1971). This comment suggests that sections 31-1-42 to -46 of the pending Act be read in conjunction with sections 31-1-127 to -129 of the pending Act.

⁷⁹² Acts § 31-1-42. This section of the pending Act is substantially the same as section ninety-eight of the Model Business Corporation Act.

⁷⁹³ Acts § 31-1-42.

⁷⁹⁴ Acts § 31-1-43.

⁷⁹⁵ Acts § 31-1-42. This section of the pending Act is substantially the same as section ninety-eight of the Model Business Corporation Act.

⁷⁹⁶ Acts § 31-1-42.

⁷⁹⁷ *Id.*

⁷⁹⁸ *Id.*

⁷⁹⁹ Acts § 31-1-43.

⁸⁰⁰ W. VA. CODE ANN. §§ 31-1-81 to -83 (1972 Replacement Volume).

file their claims, prescribe the form for these claims and fix a date after which no claims will be accepted. While the court may extend the date, any claim filed subsequent to this date may be barred from participating in the distribution of the assets.⁸⁰¹ The current Act does not specifically state that the court may take these actions, but apparently it would allow them.⁸⁰²

The court also has the prerogative of discontinuing the liquidation proceedings at any time it is established that the cause for them no longer exists. If this is done, the court will dismiss the proceedings and direct the receiver to return the remaining property to the corporation.⁸⁰³ The current Act has no similar provision for the simple reason that under it, dissolution comes before liquidation⁸⁰⁴ and no entity exists to receive the property if the liquidation is halted.

If the proceedings are not halted, the court will apply the assets first to the expenses of the liquidation and then to the payment of the corporate liabilities. Any remaining assets will be distributed among the shareholders. No change from the current practice will result from this procedure under the pending Act.⁸⁰⁵

When the liquidation proceedings are completed, the court will enter an order dissolving the corporation, and the clerk will file a certified copy of the order with the Secretary of State. No fee will be charged for this filing.⁸⁰⁶

C. Nonprofit Corporations

The current Act contains no specific provisions for the dissolution of nonprofit corporations,⁸⁰⁷ but, since the general provisions for the voluntary dissolution of business corporations do not conflict with any of the special provisions for nonstock corporations,⁸⁰⁸

⁸⁰¹ Acts § 31-1-44. This section of the pending Act is substantially the same as section 100 of the Model Business Corporation Act.

⁸⁰² W. VA. CODE ANN. § 31-1-81 (1972 Replacement Volume). This section of the current Act permits the court to "make such orders and decrees, and award such injunctions in the cause as justice and equity may require."

⁸⁰³ Acts § 31-1-45. This section of the pending Act is substantially the same as section 101 of the Model Business Corporation Act.

⁸⁰⁴ W. VA. CODE ANN. § 31-1-83 (1972 Replacement Volume).

⁸⁰⁵ Acts § 31-1-135. This section of the pending Act is virtually identical to portions of section 31-1-83 of the current Act.

⁸⁰⁶ Acts § 31-1-46. This section is substantially the same as sections 102 and 103 of the Model Business Corporation Act.

⁸⁰⁷ W. VA. CODE ANN. § 31-1-80 (1972 Replacement Volume).

⁸⁰⁸ *Id.* § 31-1-4a.

the basic procedure used for business and nonstock corporations is the same. The pending Act resolves this apparent ambiguity by spelling out a completely different procedure for nonprofit corporations.

The dissolution process is initiated by the board of directors who recommend the adoption of a resolution of dissolution to the members.⁸⁰⁹ If it is adopted,⁸¹⁰ the corporation will cease to do business except as is necessary to wind up its affairs. Notice of the impending dissolution is mailed to all creditors⁸¹¹ and is published in the local newspaper.⁸¹² The corporation must then collect its assets⁸¹³ and pay all its liabilities.⁸¹⁴ Assets remaining after payment of liabilities that are held on a condition requiring return shall be returned.⁸¹⁵ Assets that were to be used only in a specific manner must be returned or conveyed to an organization that will use them in the required manner.⁸¹⁶ Any remaining assets will be distributed in accordance with the charter or bylaws, if they so provide,⁸¹⁷ and, if not, in accordance with a plan of distribution⁸¹⁸ adopted by the corporation.⁸¹⁹

The resolution may be revoked by the unilateral act of the corporation at any time prior to the issuance of the certificate of dissolution.⁸²⁰ If it is not revoked, articles of dissolution, similar to those required of a business corporation,⁸²¹ must be submitted to the Secretary of State at the conclusion of the liquidation proceedings.⁸²² Upon his acceptance and the completion of certain filing

⁸⁰⁹ Acts § 31-1-154(a)(1).

⁸¹⁰ *Id.* This section of the pending Act provides the resolution will be adopted upon majority vote and Acts § 31-1-73 allows it to be adopted by unanimous written consent of all members entitled to vote.

⁸¹¹ Acts § 31-1-154(b).

⁸¹² Acts § 31-1-154(c).

⁸¹³ Acts § 31-1-154(b).

⁸¹⁴ Acts § 31-1-155(a).

⁸¹⁵ Acts § 31-1-155(b).

⁸¹⁶ Acts § 31-1-155(c).

⁸¹⁷ Acts § 31-1-155(d).

⁸¹⁸ Acts § 31-1-156.

⁸¹⁹ Acts § 31-1-155(e).

⁸²⁰ Acts § 31-1-157.

⁸²¹ See text accompanying note 686 *supra*.

⁸²² Acts § 31-1-40. The articles must be executed in duplicate by the president or a vice president and the secretary or an assistant secretary and verified by one of them. They must set forth the name of the corporation, that all liabilities have been paid, that all remaining assets have been distributed according to Acts §§ 31-1-155, -156 and either that no actions are pending against the corporation or that

requirements, the corporate existence will cease.⁸²³

The current Act allows the dissolution of a nonstock corporation upon presentation of sufficient cause the same as with a business corporation.⁸²⁴ The pending Act carries forth the same philosophy by authorizing a nonprofit corporation to be involuntarily dissolved for all the reasons applicable to a business corporation⁸²⁵ and for one additional ground. If a member can prove the corporation is unable to carry out the purpose for which it was formed, the court is authorized to liquidate and dissolve the corporation.⁸²⁶ Apparently the one-fifth requirement does not apply to nonprofit corporations as it does to business corporations.⁸²⁷ Therefore, any member could bring an action regardless of his support among the other members.

After the court finds that adequate cause exists for ordering liquidation, the procedure, up to and including the issuance and filing of the order of dissolution and the subsequent cessation of the corporate existence, is the same as in the case of a business corporation.⁸²⁸ The assets are distributed in the same manner as in the case of voluntary dissolution,⁸²⁹ except that if no plan of distribution has been adopted, the court will direct the distribution of the remaining assets.⁸³⁰

Upon either voluntary or involuntary dissolution, the pending Act provides that assets distributable to persons who cannot be found or are under a disability and have no legally competent

adequate provision has been made for the satisfaction of any adverse judgments. If the members were entitled to vote on the resolution of dissolution there must also be a statement setting forth either the date of the meeting at which the resolution was adopted, that a quorum was present, and that the resolution received a majority of the votes cast, or that the resolution was adopted by unanimous written consent of the members. If the members are not so entitled, a statement to that effect, the date of the board of directors meeting at which the resolution was adopted, and a statement that a majority of the directors voted in favor of the resolution must be included. Finally, a copy of the plan of dissolution or a statement that no plan was adopted must be submitted.

⁸²³ Acts § 31-1-40.

⁸²⁴ W. VA. CODE ANN. § 31-1-41 (1972 Replacement Volume).

⁸²⁵ Acts §§ 31-1-41(a), (b), (c)(1). See the text accompanying notes 727-65 *supra*.

⁸²⁶ Acts § 31-1-41(a)(5).

⁸²⁷ The one-fifth requirement is a part of Acts § 31-1-134 and, by applying the provisions of Acts § 31-1-73, seems to apply only to business corporations.

⁸²⁸ This procedure is discussed in the text accompanying notes 792-806 *supra*.

⁸²⁹ Acts §§ 31-1-158, -156.

⁸³⁰ Acts § 31-1-158(e).

person to receive the distribution for them shall be reduced to cash and deposited with the State Treasurer according to chapter thirty-six, article eight of the West Virginia Code.⁸³¹ Under the current law, the liquidator of the corporation would probably take the same action as required by the pending Act, but no positive statement instructs him to take such action. His obvious motive for taking it, however, would be to rid himself of a potential liability for payment to the improper claimant.⁸³²

Chapter thirty-six, article eight of the West Virginia Code is West Virginia's version of the Uniform Disposition of Unclaimed Property Act. It provides the technical directions necessary to turn the property over to the State Treasurer⁸³³ and the proof needed for the proper person to claim the property.⁸³⁴ Most important to the receiver, or other person liquidating the corporation, is that once the money has been turned over, he is relieved of liability for payment or delivery to the proper person.⁸³⁵

The dissolution of a corporation by the issuance of a certificate of dissolution, by order of court, or by the expiration of its period of duration does not impair any remedy available to or against the corporation, its shareholders, members, directors, and officers for any claim existing or liability incurred prior to dissolution if the action based thereon is commenced within two years of the date of dissolution.⁸³⁶ Such a provision sounds like a statute of limitations, but it is not.⁸³⁷

At common law actions against corporations abated upon the dissolution of the corporations.⁸³⁸ The effect of this statute is to perpetuate the action for two years after which it will abate.⁸³⁹ Because this is a survival statute, not a statute of limitations, statutes that toll the running of statutes of limitations will not toll the running of this statute.⁸⁴⁰ Additionally, an order of the court

⁸³¹ Acts § 31-1-47.

⁸³² W. VA. CODE ANN. § 36-8-14 (1966).

⁸³³ *Id.* §§ 36-8-11 to -13.

⁸³⁴ *Id.* § 36-8-20.

⁸³⁵ *Id.* § 36-8-14.

⁸³⁶ Acts § 31-1-48.

⁸³⁷ See *People v. Parker*, 20 Ill. 2d 486, 197 N.E.2d 30 (1964); *Bazan v. Kux Mach. Co.*, 52 Wis. 2d 325, 190 N.W.2d 521 (1971).

⁸³⁸ *E.g.* *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S.E. 600 (1888).

⁸³⁹ *People v. Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964).

⁸⁴⁰ *Bazan v. Kux Mach. Co.*, 52 Wis. 2d 325, 190 N.W.2d 521 (1971).

limiting the time within which to make a claim⁸⁴¹ will take precedence over the survival statute with respect to those who have knowledge of the order.⁸⁴² A claim will not be allowed if it is filed after the date specified in the order, nor can the type or form of a claim filed within the limit be changed after that date.⁸⁴³

The present Act has a survival statute, but it contains no time limit within which the actions must be commenced.⁸⁴⁴ Since West Virginia accepts the common law rule that the right to bring suits abates upon dissolution⁸⁴⁵ it should follow the general rule that statutes of this type are survival statutes, not statutes of limitation. Therefore, this provision of the pending Act will require any suit against an expired corporation to be brought within two years of the effective date of dissolution.

V. FOREIGN CORPORATIONS

The pending West Virginia Corporation Act, in contrast to the present Act, contains extensive and detailed statutory provisions concerning foreign corporations. Due to the more precise detail in the pending Act, the State of West Virginia will have greater control and regulatory powers over foreign corporations than under the present Act. This in turn will provide greater protection to the citizens of West Virginia in their dealings with foreign corporations.

In order to facilitate the transition between the two corporation Acts, a qualified foreign corporation existing at the time the pending Act takes effect will be entitled to all the rights and privileges applicable to foreign corporations that procure certificates of authority under the pending Act.⁸⁴⁶ Existing corporations need not reapply for a certificate of authority in order to continue to transact business in the State; however, for the sake of uniformity, the existing foreign corporations are subject to the same restrictions and limitations imposed upon foreign corporations authorized under the pending Act.⁸⁴⁷

Since a corporation has no legal existence outside the state of

⁸⁴¹ Acts § 31-1-44.

⁸⁴² *In re La Crosse Sand & Gravel Co.*, 13 Wis. 2d 41, 108 N.W.2d 176 (1961).

⁸⁴³ *Id.*

⁸⁴⁴ W. VA. CODE ANN. § 31-1-83 (1972 Replacement Volume).

⁸⁴⁵ *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S.E. 600 (1888).

⁸⁴⁶ Acts § 31-1-65.

⁸⁴⁷ *Id.*

its incorporation, the doctrine of comity allows a foreign corporation to transact and carry on its business in other states.⁸⁴⁸ Corporations are not citizens within the privileges and immunities clause of the United States Constitution, and thus, a state may abandon or abridge the common law rule of comity by excluding or regulating foreign corporations transacting business within its boundaries.⁸⁴⁹ The only exception to this rule is that corporations engaged in interstate commerce cannot be excluded or have burdens imposed on them by the forum state.⁸⁵⁰ The conditions or regulations imposed by the forum state cannot require the foreign corporation to relinquish its constitutional rights under the due process and equal protection clauses of the United States Constitution.⁸⁵¹ The basic regulation under the pending Act,⁸⁵² and that of about one-half of the jurisdictions,⁸⁵³ is to require that a foreign corporation procure a certificate of authority from the Secretary of State before it conducts affairs or transacts business in the State of West Virginia. Through this fundamental requirement, the State can constitutionally control and subject to its laws the activities of a foreign corporation.

A foreign corporation under the present corporation laws, even though it is not required to acquire a certificate of authority, must satisfy several conditions before it can hold property, transact business, or bring or maintain an action at law in West Virginia.⁸⁵⁴ With respect to the current Act, every foreign corporation except for railroads must file with the Secretary of State a copy of its articles of association or a certificate of incorporation plus any amendments thereto. These copies must be certified by an officer of the state of incorporation with whom the originals have been filed. An alternative to this filing is that the corporation file a certificate of its restated articles of incorporation. After this filing has been completed, the Secretary of State issues to the corporation a certificate of fact that such filing has been made. This certif-

⁸⁴⁸ See, e.g., *Penberthy Electromelt Co. v. Star City Glass Co.*, 148 W. Va. 419, 135 S.E.2d 289 (1964).

⁸⁴⁹ *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 180-81 (1868).

⁸⁵⁰ *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209 (1944).

⁸⁵¹ 2 MODEL BUS. CORP. ACT ANN. § 106, ¶ 2 (2d ed. 1971).

⁸⁵² Acts § 31-1-49(a). The statute provides in part that "[n]o foreign corporation shall have the right to conduct affairs or do or transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state."

⁸⁵³ 2 MODEL BUS. CORP. ACT ANN. § 106, ¶ 2 (2d ed. 1971).

⁸⁵⁴ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume).

icate of fact, along with articles of association and all amendments thereto, are to be recorded by the corporation in the county clerk's office of the county where the business is to be conducted. The second condition is that the corporation must agree, in a properly executed writing, to be governed by the laws of West Virginia. Failure to comply with these conditions will result in a fine.

One difference between the current and pending statutory provisions that regulate the activities of foreign corporations is that apparently under the pending Act a foreign corporation can own property even though it does not procure a certificate of authority from the Secretary of State. The current statute expressly forbids such ownership of property, but the pending Act is silent with respect to this issue.⁸⁵⁵ By applying the rule of statutory construction *expressio unius est exclusio alterius* to the pending statute, it appears that a foreign corporation can hold and own property without first obtaining a certificate of authority. Though this is a difference between the two Acts, it is actually of little significance. Due to the fact that it owned property within the State of West Virginia, the foreign corporation would be required to pay the taxes connected with such ownership. Even though the corporation was not transacting business within the State, West Virginia's long-arm statute⁸⁵⁶ could be applied to obtain in personam jurisdiction over the foreign corporation in a situation where a tort committed upon the property of the corporation was attributed to the foreign corporation. The "minimum contacts" rule of *International Shoe Co. v. Washington*⁸⁵⁷ would seemingly be satisfied by the corporation's mere ownership of property in West Virginia; two West Virginia decisions imply that ownership of property by a foreign corporation would be a sufficient minimum contact upon

⁸⁵⁵ *Id.* provides in part that "[n]o corporation chartered under the laws of any other state or jurisdiction shall hold any property or transact any business or bring or maintain any action, suit or proceeding in this State without having complied with the requirements hereinbefore stated." See note 852 *supra* to compare this with the language of the pending Act.

⁸⁵⁶ W. VA. CODE ANN. § 31-1-71 (1972 Replacement Volume); Acts § 31-1-15.

⁸⁵⁷ 326 U.S. 310 (1945). The United States Supreme Court stated as the general rule that a state statute permitting service on a foreign corporation by serving a state official is constitutional if the foreign corporation is doing business in the state or has certain minimum contacts with the state so that the maintenance of a lawsuit does not offend the traditional notions of justice and fair play. There are no generalized standards that can be applied to determine whether a foreign corporation has had sufficient minimum contacts with the forum state so that it can be subjected to a suit there. The material factor is the quality and nature of the corporate activity, rather than the quantity of the activity.

which to predicate in personam jurisdiction.⁸⁵⁸ This, together with the clearly discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations,⁸⁵⁹ would effectively protect the citizens of this State from any tortious conduct of such foreign corporation.

However, there is a significant difference between the current and pending provisions⁸⁶⁰ with respect to the status of foreign railroad corporations. Under the current corporation Act, every railroad corporation is deemed to be, as to its works, property, operations, acts, and businesses in the State, a domestic corporation. Thus the foreign railroad corporation is not required to satisfy the conditions under the current provision before it can transact its business within the State. No such luxury is afforded a foreign railroad corporation under the pending Act, since every foreign corporation must procure a certificate of authority from the Secretary of State in order to transact business in the State.

As previously noted, under the pending Act a foreign corporation must procure a certificate of authority before it has the legal right to conduct affairs or transact business in West Virginia. Neither the current nor the pending Act provides a statutory definition of "transacting business." However, in deciding what constitutes transacting business in order to apply this statutory provision, the

⁸⁵⁸ *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (N.D.W. Va. 1962). *Hodge v. Sands Mfg. Co.*, 151 W. Va. 133, 150 S.E.2d. 793 (1966). The federal district court in *Mann* found that minimal contacts were lacking between a foreign corporation and the State of West Virginia where the corporation was not in West Virginia and had no property in West Virginia, but rather manufactured pipe in Texas and merely sold it to a gas company in the state. The West Virginia Supreme Court of Appeals in *Hodge* implied that ownership of property within the State could be a minimum contact when it stated:

[W]hen each of two foreign corporations is not authorized to do business, has no representative, has not done business, or maintained a place of business, or entered into any contract to be performed by any party to such contract, or owned any property, or appointed anyone as its attorney in fact . . . the contacts of such foreign corporations in this state . . . do not satisfy the essential requirement that there must be minimum contacts by such foreign corporations with this State to confer jurisdiction upon a court of this State. . . .

Id. at 151-52, 150 S.E.2d at 802. In *Hodge* the court also held that the minimum contacts requisite for jurisdiction over a foreign corporation may result from a single transaction.

⁸⁵⁹ See *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957); *State ex rel. Coral Pools, Inc. v. Knapp*, 147 W. Va. 704, 131 S.E.2d 81 (1963).

⁸⁶⁰ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume); Acts § 31-1-49.

West Virginia Supreme Court of Appeals takes the view that each particular case must be determined upon its own facts and circumstances.⁸⁶¹ The court has stated, in very general terms, that a foreign corporation is transacting business within the State when it engages in corporate activities of a local character that are wholly separate from interstate commerce⁸⁶² and when the corporation is engaged in the business or character of business for which it was created.⁸⁶³ The court looks more to the character of the business rather than to the amount of business transacted.⁸⁶⁴ Specific instances in which the court has found that a foreign corporation is not doing or transacting business include: (1) the collection of debts due the corporation;⁸⁶⁵ (2) the acceptance within the State of evidence of such debts or the taking of security for the debts;⁸⁶⁶ (3) the prosecution or defense of law suits respecting valid contracts;⁸⁶⁷ (4) the selling of corporate stock;⁸⁶⁸ and (5) the mere selling and delivery of goods upon orders taken by its agents and forwarded to the corporation at its principal office.⁸⁶⁹

Though the pending Act does not define "transacting business," it does enumerate twelve different activities that, when conducted by a foreign corporation, are not considered to be doing or transacting business in the State.⁸⁷⁰ The list of activities is not all

⁸⁶¹ *Penberthy Electromelt Co. v. Star City Glass Co.*, 148 W. Va. 419, 423, 135 S.E.2d 289, 292 (1964).

⁸⁶² *United Shoe Repairing Mach. Co. v. Carney*, 116 W. Va. 224, 226, 179 S.E. 813, 814 (1935).

⁸⁶³ *Penberthy Electromelt Co. v. Star City Glass Co.* 148 W. Va. 419, 425, 135 S.E.2d 289, 293 (1964). The foreign corporation, *Penberthy Electromelt Co.*, was created primarily for the sale, licensing, and installation of electric boosts systems in glass plants. The corporation installed such a system and, thus, was carrying out the purpose for which it was created.

⁸⁶⁴ *Id.* at 425; 135 S.E.2d at 293.

⁸⁶⁵ *General Motors Acceptance Corp. v. Shadyside Coal Co.*, 102 W. Va. 402, 135 S.E. 272 (1926).

⁸⁶⁶ *Id.*

⁸⁶⁷ *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S.E. 664 (1906).

⁸⁶⁸ *Cumberland Co-operative Bakeries v. Lawson*, 91 W. Va. 245, 112 S.E. 568 (1922).

⁸⁶⁹ *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S.E. 664 (1906).

⁸⁷⁰ Acts § 31-1-49(b). The twelve activities considered not to be transacting business are: (1) maintaining or defending any legal action or proceeding; (2) holding meetings of corporate members or carrying on activities concerning internal corporate affairs; (3) maintaining bank accounts; (4) creating evidences of debt, mortgages, or liens on real or personal property; (5) securing or collecting debts and enforcing rights in secured property; (6) doing business in interstate commerce; (7) granting funds or gifts; (8) distributing information to its shareholders; (9) conduct-

inclusive, and there may be other activities that a corporation may engage in without "transacting business." Several of the activities that are deemed not to be transacting business codify prior case law in West Virginia.⁸⁷¹ Most of the twelve activities are such that they are not the ordinary activities of business for which a corporation is created.

The pending statutory provision follows the general rule throughout the country that single or isolated transactions or isolated contracts of foreign corporations in the forum state are not ordinarily regarded as transacting business therein.⁸⁷² Even though a single isolated act or transaction is not transacting business in the forum state, it can subject the corporation to the jurisdiction of the forum state if minimum contacts exist between the state and the corporation.⁸⁷³

The current provision which sets forth the activities that do not constitute transacting business in the State⁸⁷⁴ is considerably narrower in scope than is the pending statutory provision. It lists activities that are exclusively related to securing loans on real or personal property situated in West Virginia. Among the most significant of these are the acquisition by purchase of loans secured by mortgages or deeds of trust on real and personal property located in West Virginia, the maintenance or defense of any actions relative to such loans, mortgages, or deeds of trust, the acquisition of title to property under foreclosure sale, the collection of such loans, and the maintenance of bank accounts in West Virginia banks for the collection of such loans. These activities, recognized as not transacting business under the present Act, have been retained under the pending Act.⁸⁷⁵

The pending Act includes some new activities that are not to be considered as transacting business by a foreign corporation. They are: (1) holding corporate meetings concerning internal affairs; (2) granting funds or other gifts; (3) distributing information to its shareholders or members; (4) conducting an isolated transac-

ing certain isolated transactions; (10) effecting sales through independent contractors; (11) soliciting or procuring orders where such orders require acceptance without this state before becoming binding contracts; (12) maintaining offices or agencies for the transfer, exchange, and registration of its securities.

⁸⁷¹ See notes 865-69 *supra* and accompanying text.

⁸⁷² See Annot., 19 A.L.R.3d 13 (1968).

⁸⁷³ See notes 856-59 *supra* and accompanying text.

⁸⁷⁴ W. VA. CODE ANN. § 31-1-79a (1972 Replacement Volume).

⁸⁷⁵ See note 870 *supra*.

tion; and (5) effecting sales through independent contractors. Hence, foreign corporations will be given greater freedom under the pending Act than they are given under the current Act to carry on certain activities without procuring a certificate of authority.

Under the pending Act, any foreign corporation that conducts affairs or transacts business in West Virginia without first obtaining a certificate of authority cannot maintain a suit or action in a State court.⁸⁷⁶ The lack of a certificate of authority, however, does not invalidate any contract or act of the corporation, and it does not prevent the foreign corporation from defending an action in any State court.⁸⁷⁷ The unqualified corporation remains liable to the State for all the fees and taxes it would have to pay if it were duly qualified with a certificate of authority. It must also pay any penalties for failure to pay such fees and taxes. With respect to transacting or doing business without a certificate of authority, the pending Act is not as broad as the current Act. The current statute states that unauthorized foreign corporations cannot hold title to property in West Virginia;⁸⁷⁸ the pending statute is silent on this issue. However, as previously noted, this difference is of little significance.

The drafters of the Model Business Corporation Act contemplated that a contract made by a non-qualified foreign corporation is not totally void since such a contract may be enforced by a law suit instituted after the foreign corporation becomes authorized to transact business.⁸⁷⁹ This is in accord with the general trend throughout the country that a foreign corporation, after qualification, can enforce a contract made before qualification.⁸⁸⁰ If the action has been instituted prior to qualification, the corporation may qualify and merely continue the litigation without the necessity of reinstituting the suit.⁸⁸¹ This provision becomes of vital importance when a statute of limitations is involved.

⁸⁷⁶ Acts § 31-1-66. The statute provides in part that "[n]o foreign corporation which is conducting affairs or doing or transacting business in this state without a certificate of authority shall be permitted to maintain any action or proceeding in any court of this state until such corporation shall have obtained a certificate of authority."

⁸⁷⁷ *Id.*

⁸⁷⁸ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume). See note 855 *supra*.

⁸⁷⁹ 2 MODEL BUS. CORP. ACT ANN. § 124, ¶ 2 (2d ed. 1971).

⁸⁸⁰ *E.g.*, *Farmer's Mut. Hail Ins. Co. v. Gorsuch*, 123 Ind. App. 264, 110 N.E.2d 344 (1953); *Day v. Stokes*, 97 N.J. Eq. 378, 127 A. 331 (1925); *Niblack v. Seaburg Hotel Co.*, 42 N.M. 281, 76 P.2d 1156 (1938).

⁸⁸¹ 2 MODEL BUS. CORP. ACT ANN. § 124, ¶ 2 (2d ed. 1971).

The same rule apparently applies under the current Act.⁸⁸² The West Virginia Supreme Court of Appeals has held on numerous occasions that a contract made by a foreign corporation before it has complied with the statutory prerequisites for the right to do business, will not, on that account, be held absolutely void unless the statute expressly so declares.⁸⁸³ In *Toledo Tie & Lumber Co. v. Thomas*,⁸⁸⁴ the court, after stating the above rule, went on to add that if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, the penalty will be deemed to be exclusive of all others.⁸⁸⁵ Since the current Act makes the failure to comply a misdemeanor,⁸⁸⁶ it can be inferred that this is the only penalty the corporation must suffer and that the corporation can enforce the contract after becoming qualified to transact business within the State.

In order to procure the certificate of authority that is required by the pending Act, a foreign corporation must make an application setting forth certain information in order to enable the Secretary of State to make the determination of its qualifications.⁸⁸⁷ The information the corporation is required to give is similar to that found in the articles of incorporation⁸⁸⁸ and must include such facts as the name of the corporation, the state in which it is incorporated, the date of incorporation and the period of duration, the address of its corporate home office, the address of its principal office within the State of West Virginia, its purposes for doing business within the State, the names and addresses of its directors and officers, and any other appropriate information needed by the Secretary of State to make a determination of its qualification to do business in the State.

If the corporation is a business, as opposed to a nonprofit, corporation, additional information is required in the application.⁸⁸⁹ It must contain a statement of the aggregate number of shares that the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series,

⁸⁸² W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume).

⁸⁸³ *E.g.*, *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S.E. 373 (1911).

⁸⁸⁴ 33 W. Va. 566, 11 S.E. 37 (1890).

⁸⁸⁵ *Id.* at 570, 11 S.E. at 38.

⁸⁸⁶ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume).

⁸⁸⁷ Acts § 31-1-53(a).

⁸⁸⁸ Compare Acts § 31-1-53 with Acts § 31-1-27 (contents of the articles of incorporation of a domestic corporation).

⁸⁸⁹ Acts § 31-1-53(b).

if any, within a class. An identical statement is required for the aggregate number of shares actually issued by the business corporation. The stated capital of the corporation, a monetary estimate of the value of all the corporation's property, the value of corporate property within West Virginia, the gross amount of annual corporate business, and the gross amount of annual corporate business transacted within West Virginia must also be included.

It is mandatory under the pending Act that all applications for certificates of authority be made on forms furnished by the Secretary of State.⁸⁹⁰ The application is to be executed in duplicate and signed by the corporation's president or vice president and by the secretary or one of his assistants. The application need only be verified by one of the signing corporate officers. The corporation then files with the Secretary of State duplicate originals of the application along with a certified copy of its articles of incorporation and all amendments thereto, and a certificate of its good standing in the incorporating state or country.⁸⁹¹ When the Secretary of State finds that the corporation is entitled to a certificate of authority to do business in the State, he files the documents and issues the certificate. The foreign corporation then must record the certificate of authority, together with the articles of incorporation and all amendments thereto, in the county clerk's office of the county where the principal office of the corporation is located in West Virginia. If there is no principal office of the corporation within the State, the documents may be recorded in any county clerk's office where the corporation is transacting business.

Upon the issuance and proper recordation of the certificate of authority, a foreign corporation may transact business in West Virginia for those purposes set forth in its application.⁸⁹² The duly authorized foreign corporation is entitled to the same rights, powers, and privileges that domestic corporations have.⁸⁹³ Thus, duly authorized foreign corporations are on an equal basis with domestic corporations.⁸⁹⁴ However, the Secretary of State reserves the

⁸⁹⁰ Acts § 31-1-53(c).

⁸⁹¹ See Acts § 31-1-54 for the filing, issuance, and recordation of a certificate of authority.

⁸⁹² Acts § 31-1-55.

⁸⁹³ Acts § 31-1-50.

⁸⁹⁴ Prior case law decided under W. VA. CODE ANN. § 31-1-79 (1972 Replacement Value) has held that there is to be equality between foreign and domestic corporations with foreign corporations having the same rights, powers, and privileges as domestic corporations. *Floyd v. National Loan & Inv. Co.*, 49 W. Va. 327,

right to revoke a foreign corporation's certificate of authority under certain circumstances.⁸⁹⁵ This right of the Secretary of State to revoke a foreign corporation's authority to transact business is a new concept in West Virginia corporate law.⁸⁹⁶ Whenever the Secretary revokes a foreign corporation's certificate of authority, the corporation has thirty days in which to appeal such order of revocation to the circuit court of the county in which the principal office of the corporation is located,⁸⁹⁷ or if the principal office of the corporation is located outside the State, to the circuit court of Kanawha County. If the appeal is not taken within the thirty days, the order becomes final and the authority of the corporation to transact business in West Virginia ceases.

The detailed procedure under the pending Act to which a foreign corporation must adhere when applying for and obtaining a certificate of authority has been interpreted as fostering several different purposes.⁸⁹⁸ These purposes are: (1) to place foreign corporations under the supervision of the state and to protect the state's citizens in their transactions with foreign corporations; (2) to subject the corporation to inspection so that its condition, standing, and solvency may be known; (3) to place the foreign corporation in a status of equality with domestic corporations with respect to information required to be furnished; (4) to facilitate the subjecting of a corporation to the jurisdiction of the state's courts, thereby removing a disadvantage to citizens of the state who deal with them; and (5) to provide readily accessible evidence of the corporation's existence. Each of these five purposes provides greater protection for the citizens of the State in dealings with a foreign corporation, and this is the single largest asset of the application and filing procedures.

38 S.E. 653 (1901); *Archer v. Baltimore Bldg. & Loan Ass'n*, 45 W. Va. 37, 30 S.E. 241 (1898).

⁸⁹⁵ Acts §§ 31-1-55, -62. There are four major situations where the Secretary of State can revoke a foreign corporation's certificate of authority. These occur when: (1) the corporation has failed to file with the Secretary of State a statement concerning the change of its principal office; (2) the corporation has failed to file with the Secretary of State any amendment to its articles of incorporation; (3) the corporation has failed to file with the Secretary any articles of merger; and (4) the corporation has made a misrepresentation of any material matter in any application, report, affidavit, or other document submitted by the corporation pursuant to the pending Act.

⁸⁹⁶ The current Act does not contain anything concerning a Secretary of State's power of revocation. No prior case law could be found on this issue.

⁸⁹⁷ Acts § 31-1-63.

⁸⁹⁸ 2 MODEL BUS. CORP. ACT ANN. §§ 110-12, ¶ 2 (2d ed. 1971).

As previously discussed, the current Act requires the satisfaction of several conditions by all foreign corporations before a certificate of authority will be issued.⁸⁹⁹ A very significant distinction exists between the current and pending Acts with respect to a foreign corporation's qualification to transact business. Under the pending Act, the Secretary of State is given some discretion in issuing a certificate of authority.⁹⁰⁰ The foreign corporation receives the certificate of authority only upon a showing that it is entitled to it. The Secretary of State makes the determination upon all the information placed before him in the application for the certificate. The current procedure is that the Secretary of State automatically issues the certificate of fact after the corporation has filed its articles of incorporation.⁹⁰¹ This discretionary power of the Secretary of State under the pending Act to withhold the certificate from a corporation will ultimately provide the citizens of this State greater protection against fraudulent practices of unfamiliar foreign corporations. However, there is an important safeguard contained in the pending Act that will effectively prevent the Secretary of State from abusing this discretionary power. Any foreign corporation that is denied a certificate of authority by the Secretary may seek judicial review of such decision by appeal to the circuit court of the county in which the principal office of the corporation is located, or if the principal office is located outside the State, to the circuit court of Kanawha County.⁹⁰² Further appeals may be taken as in other civil actions.

Whenever a foreign corporation amends its articles of incorporation, it must, under the pending Act, file an authenticated copy of the amendment with the Secretary of State within thirty days.⁹⁰³ The Secretary of State then issues proof of such filing in the form of a certificate of fact. The certificate, together with a true copy of the amendment, is then recorded by the corporation in the county clerk's office where the original certificate of authority was re-

⁸⁹⁹ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume).

⁹⁰⁰ The language that connotes that discretion is found in Acts § 31-1-53(a)(8): "to enable the secretary of state to determine whether such corporation is entitled to a certificate of authority to conduct its affairs or do or transact business in this state. . . ."

⁹⁰¹ W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume) mandates that after the corporation has filed its articles of incorporation, the Secretary of State shall issue to the corporation a certificate of fact of its having done so.

⁹⁰² Acts § 31-1-68.

⁹⁰³ Acts § 31-1-57. The copy of the amendment must be authenticated by the proper officer of the state or country under the laws of which it is incorporated.

corded. Failure to file the amendment within six months of its effective date may result in a one thousand dollar fine⁹⁰⁴ or even revocation of the certificate of authority.⁹⁰⁵

There are several significant differences between the current and pending Acts in this particular area.⁹⁰⁶ The most significant is that under the pending Act the Secretary of State has the right to revoke a foreign corporation's authority to transact business in the State if it fails to properly file an amendment to its articles of incorporation.⁹⁰⁷ This prerogative was not granted to the Secretary of State under the current Act. The second change instituted by the pending Act is that it codifies the rule that the filing of an amendment will not alter or enlarge the purposes for which the corporation is authorized to transact business in the State nor will it give the corporation the authority to use any name other than the one in its certificate of authority.⁹⁰⁸

Under the pending Act, a qualified foreign corporation that desires either to change its corporate name or to enlarge or alter the purposes for which it is qualified to transact business within West Virginia must obtain an amended certificate of authority by making an application to the Secretary of State.⁹⁰⁹ The requirements and procedure for obtaining an amended certificate of authority are the same as those for obtaining the original certificate of authority. It is noteworthy that the corporation cannot change its corporate name or its purposes for transacting business by merely filing an amendment to its articles of incorporation.⁹¹⁰ In-

⁹⁰⁴ *Id.*

⁹⁰⁵ Acts § 31-1-62(a)(2).

⁹⁰⁶ The procedure under W. VA. CODE ANN. § 31-1-79 (1972 Replacement Volume) requires that the foreign corporation file an amendment to its articles of incorporation with the Secretary of State who then issues a certificate showing the filing. The certificate, together with a copy of the amendment, is to be recorded in the county clerk's office of the county, or one of the counties, in which its business is conducted. The corporation is subject to a \$1,000 fine if it fails to file the amendment within six months from the date it takes effect.

⁹⁰⁷ Acts § 31-1-62.

⁹⁰⁸ Acts § 31-1-57. There is no prior West Virginia case law on this point, but this is the general rule throughout the United States.

⁹⁰⁹ Acts § 31-1-59.

⁹¹⁰ Acts § 31-1-57. Under the pending Act an amendment to the articles of incorporation is to be authenticated by an officer of the incorporating state or country. This authentication would be evidence of the incorporating state's consent to the amendment. The language of the statute which states that "[t]he secretary of state shall issue to such corporation a certificate. . . ." leads to the conclusion that the Secretary of State has no discretion in this area of the law.

stead, the foreign corporation must obtain an amended certificate of authority if it desires to change its name or purposes, and this procedure allows the Secretary of State the discretion to grant or deny the amended certificate.⁹¹¹ This additional requirement provides the citizens of West Virginia with greater protection since the foreign corporation will be effectively prevented from misleading the public or engaging in otherwise fraudulent practices. It should also discourage unfair competition and practices between corporations.

The corporation is subject to a one thousand dollar fine for the failure to comply with the pending statutory provision within six months from the date it changes its corporate name or purposes.⁹¹² The Secretary of State cannot revoke the certificate of authority, as he can in certain other circumstances, if the corporation fails to procure an amended certificate. The current corporation Act has no provisions concerning amended certificates of authority.

When the foreign corporation changes its principal office, the pending Act requires it to file with the Secretary of State a statement containing certain facts and information.⁹¹³ The statement is required to be filed with the Secretary of State within ten days after such change, and the change of the principal office is not considered consummated until the statement is so filed. The statement must be verified by either the president or vice president of the corporation. Presumably one of the purposes for such a statement being filed is to aid the Secretary of State in transmitting a copy of the notice and service of process by registered or certified mail to the corporation's most recent business address pursuant to the long-arm statute of the pending Act.⁹¹⁴

Several statutory provisions of the pending Act deal extensively with the corporate name of a foreign corporation. Under the pending Act a foreign corporation is effectively prevented from using the same name, or a deceptively similar name, as an existing domestic corporation, a previously authorized foreign corporation,

⁹¹¹ Acts § 31-1-59. The requirements for the application, issuance, and recordation for an amended certificate of authority are the same as for the original certificate of authority.

⁹¹² *Id.*

⁹¹³ Acts § 31-1-56. The facts that must be set forth are to include the name of the corporation, the address of its then principal office, the address to which the principal office is to be changed, and the assurance that the change in its principal office was authorized by a resolution duly adopted by its board of directors.

⁹¹⁴ Acts § 31-1-15.

or the corporate name reserved or registered under section thirteen of the Act.⁹¹⁵ Thus, the very general rule prevailing throughout the United States that a corporation is entitled to protection against the use of the same or similar name by another corporation is codified by the terms of this provision.⁹¹⁶ There is a split of authority as to whether a foreign corporation is entitled to the protection of its corporate name from a subsequently formed domestic corporation; the better view gives the foreign corporations such protection⁹¹⁷ and the pending Act adopts this better view.⁹¹⁸ However, the pending Act fails to meet the issue of providing protection for the unregistered corporate name of a foreign corporation not authorized to transact business within the State from that of a subsequently formed domestic corporation. There is a split of authority throughout the country on this issue.⁹¹⁹ It can be argued that since a registered corporate name and the corporate name of an authorized foreign corporation are specifically protected and since the statute is silent with regard to an unauthorized foreign corporation's name that is not registered, the Legislature's intent was to not protect the unregistered name of an unauthorized foreign corporation from that of a subsequently formed domestic corporation.

Besides prohibiting "deceptively similar" names, the pending Act prohibits a foreign corporation from using a corporate name that might mislead the public.⁹²⁰ This provision is very important

⁹¹⁵ Acts § 31-1-51(a)(3).

⁹¹⁶ See Annot., 66 A.L.R. 948 (1930).

⁹¹⁷ *Id.* A leading case that protects a foreign corporation's name from that of a subsequently formed domestic corporation is *United States Light & Heating Co. v. United States Light & Heating Co.*, 181 F. 182 (C.C.S.D.N.Y. 1910).

⁹¹⁸ Acts § 31-1-11. The statute provides in part that the domestic corporation's name "[s]hall not be the same as, or deceptively similar to, the name of any . . . foreign corporation, whether stock or nonstock and whether or not organized for profit, authorized to conduct affairs or do or transact business in this state."

⁹¹⁹ See Annot., 26 A.L.R.3d 994 (1969). Where the domestic corporation adopted the name with the fraudulent purpose of pirating the business of the foreign corporation or with actual knowledge of the existence and name of the foreign corporation, the fact that the latter has not qualified to do business has been rejected as a defense. On the other hand, where the domestic corporation's adoption or use of its name was not made with a fraudulent purpose or with actual knowledge of the existence and name of the foreign corporation, the courts are divided as to the effect of the latter's failure to qualify in the state.

⁹²⁰ Acts § 31-1-51(a)(2). The statute provides that the name of a foreign corporation

shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes in its articles of incorporation, or if the corporate name of [the] corporation

in that it gives the consumer greater protection against possible fraudulent practices by a foreign corporation.

There are three exceptions⁹²¹ to the rule that a certificate of authority will not be issued to a foreign corporation whose name is the same or deceptively similar to the name of any domestic corporation, the name of any qualified foreign corporation, or a name duly reserved or registered under the Act.⁹²² The first exception authorizes the use of a fictitious name by the foreign corporation. The use of a fictitious name prevents any possible deception of the public or any possible damage to the business of a domestic corporation with a name similar to that of the foreign corporation. The second exception allows a similar name to be used if the domestic corporation consents in writing and one or more words are added to distinguish the names. The third exception takes cognizance of a judicial decree which establishes the prior right of the foreign corporation to the use of its name in West Virginia. The application of these exceptions does not prejudice the interests of any corporation or the public.

Any foreign corporation may register its corporate name by filing with the Secretary of State an application for registration and a certificate which sets forth that the foreign corporation is in good standing under the laws of the incorporating state.⁹²³ This registration of the corporate name will prevent all other corporations from using the same or deceptively similar name even though the registered name is that of an unauthorized foreign corporation.⁹²⁴ The corporation may renew its registered name by annually filing, in the last three months of the current fiscal year, an application for renewal along with a certificate of good standing as required in the original application for registration.⁹²⁵ The current

indicates or implies that it is authorized or empowered to conduct the business of banking or insurance unless such corporation is so authorized or empowered under the laws of this state.

⁹²¹ Acts § 31-1-51(b).

⁹²² Acts § 31-1-51(a)(3).

⁹²³ Acts § 31-1-13. The application for registering the corporate name must set forth the name of the corporation, the state or territory under the laws of which it is incorporated, the date of its incorporation, a statement to the effect that it is carrying on business, and a brief statement of the type of business in which it is engaged.

⁹²⁴ Acts §§ 31-1-11(a)(3), -51(a)(3) prohibit domestic and foreign corporations respectively from using the same, or a deceptively similar name, as that of a corporate name which has been duly registered or reserved under the Act.

⁹²⁵ Acts § 31-1-14.

corporation laws have no comparable statutory provisions concerning registration of a foreign corporation's name or renewal of that registered name.

A corporate name may be reserved for a period of 120 days by a foreign corporation that intends to procure a certificate of authority, by a previously authorized foreign corporation that intends to change its name, or by any person who intends to organize a foreign corporation which will transact business in West Virginia.⁹²⁶

When a qualified foreign corporation changes its corporate name to one not available to it under the provisions of the pending Act, two sanctions are automatically imposed upon the foreign corporation.⁹²⁷ The corporation's certificate of authority and the resultant right to transact business in the State are suspended until the corporation changes its name to one properly available to it under the laws of West Virginia.

When two foreign corporations merge, the pending Act requires a filing of the articles of merger only when a duly authorized foreign corporation is a party to the merger *and* it is the surviving corporation.⁹²⁸ In such an instance, the original certificate of authority remains in effect unless the surviving corporation changes its name or desires to pursue purposes other than those for which it was authorized, in which case a new or amended certificate of authority is necessary.

A certificate of authority must be obtained in accordance with the applicable sections⁹²⁹ of the pending Act whenever a foreign corporation that has not qualified to transact business is the survivor of a merger with a previously qualified or unqualified foreign corporation, and the surviving corporation desires to transact business in the State.⁹³⁰ The procedure to be followed in the event of a consolidation is not included in this section on merger because the drafters of the Model Business Corporation Act, upon which this provision is modeled, took the position that consolidation results in the formation of a new corporation that then must procure its own certificate of authority.⁹³¹

⁹²⁶ Acts § 31-1-12.

⁹²⁷ Acts § 31-1-52.

⁹²⁸ Acts § 31-1-58.

⁹²⁹ Acts §§ 31-1-53, -54.

⁹³⁰ 2 MODEL BUS. CORP. ACT ANN. § 117, ¶ 2 (2d ed. 1971).

⁹³¹ *Id.*

When there is a merger in which the previously authorized foreign corporation is the surviving corporation, the articles of merger must be authenticated by a proper state official of the state under whose laws the merger was effected, and the articles must be filed within thirty days after the effective date of the merger. When the articles of merger are filed, the Secretary of State will issue a certificate of merger as proof of such filing. This certificate, along with a copy of the articles of merger, are to be recorded in the county clerk's office where the original certificate of authority was recorded. Subject to judicial review, the Secretary of State may revoke a foreign corporation's certificate of authority when the corporation has failed to file its articles of merger.⁹³²

When the new or surviving corporation following a merger or consolidation is a foreign corporation that has not qualified to transact business or hold property in West Virginia, it must first pay all taxes due the State before the Secretary of State will issue the certificate of consolidation or merger.⁹³³ This condition of paying all taxes due the State has an identical counterpart in the current statutory provisions.⁹³⁴ Also under the pending Act, a corporation cannot expire until it has paid all the taxes it owes the State.⁹³⁵ The current Act has no such provision concerning expiration.

The pending Act makes it mandatory that a foreign corporation procure a certificate of withdrawal when it desires to cease transacting business in the State of West Virginia.⁹³⁶ There are several conditions which must be satisfied before a foreign corporation can obtain the desired certificate of withdrawal. First, the corporation must publish a Class II legal advertisement in the county in which its principal West Virginia office is located. After such publication, the corporation must apply to the Secretary of State for a certificate of withdrawal. The application for the certificate of withdrawal is to contain certain specified information,⁹³⁷

⁹³² Acts §§ 31-1-62, -63.

⁹³³ Acts § 31-1-61.

⁹³⁴ W. VA. CODE ANN. § 31-1-82a (1972 Replacement Volume).

⁹³⁵ Acts § 31-1-61.

⁹³⁶ Acts § 31-1-60.

⁹³⁷ Acts § 31-1-60(b). The foreign corporation's application for a certificate of withdrawal is to include information such as: (1) the name of the corporation and the state in which it is incorporated; (2) a statement to the effect that the corporation has ceased transacting business in West Virginia and that it surrenders its authority to transact business in West Virginia; (3) a post office address to which

and in the case of a business corporation it must disclose additional facts.⁹³⁸ Forms prescribed and furnished by the Secretary of State must be used as the application for the certificate of withdrawal. This application is to be duly executed by the corporation's president or vice president and by its secretary or an assistant secretary and verified by one of the signing officers. Even when the duplicate originals of the application are in the office of the Secretary of State, the Secretary must be satisfied that all fees have been paid before he can file one of the originals. The other original of the application is then affixed to the certificate of withdrawal and both are returned to the corporation to be recorded in the county clerk's office where the corporation's original certificate of authority was recorded.⁹³⁹ Once the certificate of withdrawal is recorded, the foreign corporation's authority to transact business in West Virginia has ceased. It is important to note that the Secretary of State is to withhold the issuance of the certificate of withdrawal until the corporation has paid all its taxes due the State.⁹⁴⁰

The procedure for withdrawal under the pending Act is substantially the same as that required by the current statutory provision.⁹⁴¹ The differences are that the pending statute states the specific information that is to be set forth in the application for the certificate of withdrawal, and it also requires the application and the certificate of withdrawal to be recorded by the corporation. The current statute is silent with respect to these two points. These changes will give the public record notice that the corporation is no longer doing business in West Virginia. Though the areas for the publication of the legal advertisement are slightly different between the two provisions,⁹⁴² the difference is of little significance.

a copy of service of process may be mailed by the Secretary of State; and (4) such additional information that is necessary to enable the Secretary to determine and assess any unpaid fees payable by the corporation.

⁹³⁸ Acts § 31-1-60(c). The business corporation's application must include additional information such as: (1) a statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of the application; (2) a statement of the aggregate number of issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, as of the date of the application; and (3) a statement, expressed in dollars, of the amount of the stated capital of the corporation, as of the date of the application.

⁹³⁹ See Acts § 31-1-60(e), (f) for the filing and recording procedures with respect to a certificate of withdrawal.

⁹⁴⁰ Acts § 31-1-61.

⁹⁴¹ W. VA. CODE ANN § 31-1-84 (1972 Replacement Volume).

⁹⁴² Under the current statute, *id.*, the publication area for the legal advertise-

The current statutory provision also expressly states that the issuance of a certificate of withdrawal does not relieve the corporation from liability for its debts or obligations to the State of West Virginia or any of its residents. In *Frazier v. Steel & Tube Co. of America*, the West Virginia Supreme Court of Appeals held that foreign corporations withdrawing from the State of West Virginia or ceasing to do business therein are subject to the rules of law governing expired domestic corporations with respect to actions against them.⁹⁴³ The court went on to state that the withdrawal of a foreign corporation from the State does not affect the corporation's capacity to sue or be sued concerning a contract made or a right vested during the period when the corporation was authorized to transact business in the State.⁹⁴⁴

In *Ward v. Island Creek Fuel & Transportation Co.*, the court followed *Frazier*.⁹⁴⁵ At the time the cause of action arose, the corporation was licensed to do business within the State, but the corporation withdrew from the State before the suit was instituted. The court stated that the consent to be sued in West Virginia, a quid pro quo for the privilege of doing business in the State, survived the termination of the license; the survival was in fact a condition of termination.⁹⁴⁶

It is important to note that both *Frazier* and *Ward* were decided under the current provision⁹⁴⁷ which expressly provides that a certificate of withdrawal does not relieve the corporation of any debt or obligation due from it to the State or any resident thereof. This provision is not contained in the pending Act, but when the long-arm statute⁹⁴⁸ is applied in conjunction with the "minimum contacts" rule, the foreign corporation would still be held responsible for its actions while in the process of transacting business, even though it had withdrawn from the State prior to the institution of the law suit. The fact that the foreign corporation was authorized

ment is to be in some county of the state where the foreign corporation carries on its business. The publication area for the legal advertisement under the pending statute, Acts § 31-1-60, will be the county wherein the corporation's principal office within the State is located.

⁹⁴³ 101 W. Va. 327, 334, 132 S.E. 723, 726 (1926). The general rule governing expired domestic corporations is that an action for damages can be brought against the corporation in spite of its dissolution prior to the bringing of such suit.

⁹⁴⁴ *Id.* at 334, 132 S.E. at 726.

⁹⁴⁵ 261 F. Supp. 810 (N.D.W. Va. 1966).

⁹⁴⁶ *Id.* at 813.

⁹⁴⁷ W. VA. CODE ANN. § 31-1-84 (1972 Replacement Volume).

⁹⁴⁸ Acts § 31-1-15.

to transact business in the State at the time the cause of action arose would satisfy the "minimum contacts" rule and give the State court jurisdiction over the corporation. In a situation where the cause of action arose after the foreign corporation withdrew from the State, the corporation's status would be that of a corporation not authorized to transact business in the State. When there is a sufficient nexus between the transaction of business and the resultant cause of action, the long-arm statute would be applied. The "minimum contacts" rule would be satisfied by the fact that the corporation had been authorized to transact the business which ultimately led to the cause of action. Thus, a State court could obtain jurisdiction over a foreign corporation that had withdrawn prior to the cause of action arising, and the citizens of the State would still be able to obtain redress for their grievances.

The detailed statutory provisions of the pending Act will provide the State of West Virginia with greater regulatory powers and control over foreign corporations than has heretofore existed. Additionally, there should be very little political abuse of these powers since most are subject to judicial review. Thus, the greater exercise of control over foreign corporations will in turn afford greater protection to the citizens of this State in their dealings with such corporations, and this in itself should prove to be one of the biggest assets of the pending Act.

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